89-1362

No. ________

In The

Supreme Court of the United States

October Term, 1989

Washington Mills Electro Minerals Corp., Washington Mills Ceramics Corp., John T. Williams, and Peter Williams

Petitioners,

v.

DeLong Equipment Company,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTION PRESENTED

Whether in the absence of an agreement to set, maintain or control the ***resale*** price of a product, a manufacturer's alleged agreement with one of its distributors to establish the manufacturer's ***wholesale*** price to other distributors constitutes vertical price-fixing in *per se* violation of Section 1 of the Sherman Act?

LIST OF PARTIES

The following persons and entities were parties to the proceedings in the Court of Appeals: Washington Mills Ceramic Corporation, Washington Mills Abrasive Co., Peter H. Williams, John T. Williams (Defendants-Petitioners)[1] (hereinafter "Washington Mills"), Hans Van der Sande and Robert E. Bauldauf; DeLong Equipment Company (Plaintiff-Respondent) (hereinafter "DeLong").

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[1] Both Washington Mills Ceramic Corporation and Washington Mills Abrasive Co. (now known as Washington Mills Electro Minerals Corp.) are wholly-owned subsidiaries of Washington Mills Company, a Delaware Corporation.

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The opinion of the United States Court of Appeals for the Eleventh Circuit is reported as *DeLong Equipment Company v. Washington Mills Abrasive Co.*, 887 F.2d 1499 (11th Cir. 1989), and is set forth in Petitioners' Appendix at 1.

The Final Judgment of the District Court Pursuant to Rule 54(b) is set forth in Petitioners' Appendix at 49.

The Order of the District Court granting Petitioners' Motion for Summary Judgment is set forth in Petitioners' Appendix at 51.

The Order of the District Court denying Respondent's Motion for Reconsideration is set forth in Petitioners' Appendix at 79.

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JURISDICTIONAL STATEMENT

The Judgment of the Court of Appeals for the Eleventh Circuit was entered on November 13, 1989. The Eleventh Circuit denied Petitioners' Suggestion for Rehearing *In Banc* on January 22, 1990. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254.

FEDERAL STATUTE INVOLVED

The Sherman Act, Section 1, 15 U.S.C. § 1 provides in pertinent part:

> Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . . .

STATEMENT OF THE CASE

This is a dealer termination case under Section 1 of the Sherman Act. Respondent DeLong contended that it was terminated as a Washington Mills distributor for refusing to go along with an alleged scheme on the part of Washington Mills and another of its wholesale distributors, BCS Company, to artificially inflate Washington Mills' ***wholesale*** price for a particular line of "ceramic preformed tumbling media", abrasive materials used in the finishing and polishing of metal parts. Applying a "rule of reason" analysis, the District Court granted summary judgment in favor of Washington Mills. The Eleventh Circuit reversed, holding that such an agreement regarding wholesale pricing constitutes vertical "price-fixing" in *per se* violation of Sherman Section 1, even though there was no allegation or evidence of an agreement relating to the *resale* price to be charged by distributors.

In the early 1980's, largely through the efforts of BCS, a distributor located in New England, three of Washington Mills' ceramic tumbling media products were approved by Pratt & Whitney Aircraft for use in the manufacture of jet engine blades at a new plant opening in Columbus, Georgia.

As part of its lengthy approval process, Pratt & Whitney assigns to each product on its buying list a Process Materials Control, or "PMC", number and requires that any product sold to it must have the PMC number stamped on the box. Pratt takes the position that whoever places the PMC number on the box is guaranteeing that the product contained therein is in fact the product that was approved and that it meets Pratt's specifications. According to Pratt, the person placing the PMC number on the box "is liable for the results of that product."

The three types of ceramic media here involved were designated by Pratt as PMC 3175-1, 3178-1 and 3179-1. Washington Mills called the three products "P&W Specials", and established an initial wholesale price of 85 cents per pound to all of its distributors for any product labeled at the factory as "PMC 3175", "PMC 3178" or "PMC 3179". DeLong contends in this action that the price so established was artificially inflated in order to build in a "pad" with which Washington Mills could pay a commission to BCS. (BCS, although having been instrumental in obtaining approval of the Washington Mills product by Pratt, could not profit from its efforts because it was located too far from the Columbus, Georgia plant to effectively compete for the new business.).

Washington Mills' pricing policy for the "P&W Special" media ultimately led to a dispute with Delong Equipment, which had won the bid for supplying the Columbus plant and was buying the material from Washington Mills for resale to Pratt. DeLong contended that the "special" media was in fact no different from Washington Mills' stock media offered at lower prices; that the

P&W Specials, although bearing the guarantee, should be priced by Washington Mills at the same price as its stock or generic media; and that the higher price charged by Washington Mills to DeLong and other distributors for material labeled at the factory with PMC numbers was simply an attempt to extract inflated profits on sales destined to go to Pratt, the end-user who purchased from DeLong, part of which profits were shared by Washington Mills with BCS in the form of commissions.

DeLong was eventually terminated by Washington Mills, and DeLong contended that the termination was the result of DeLong's on-going complaints to Washington Mills concerning the price *it was being charged* for the P&W Special media.

DeLong has never contended (nor is there evidence to support such a contention) that Washington Mills attempted to dictate, maintain, set or fix ***resale*** prices at which the media in question could be resold to Pratt by DeLong, BCS or any other distributor. The gravamen of DeLong's complaint is that, although DeLong alone determined at what price it would resell to Pratt & Whitney, the wholesale price charged by Washington Mills to DeLong for media certified to meet Pratt & Whitney's specifications was artificially high, and that, in order to make a profit, it was necessary for DeLong to in turn charge a higher price to Pratt.

DeLong makes its contention clear in the briefs filed with the District Court:

> "The evidence in this action demonstrates a conspiracy to fix the *wholesale* price – the price charged to DeLong."

Reply Memorandum in Support of Plaintiff's Motion to Reconsider. R. 5-100, p. 1 (emphasis in original).[2]

The District Court found that the conduct complained of, although centered around the dispute regarding Washington Mills' pricing policy for the P&W Special materials, was best characterized as a non-price restraint, and, therefore, that a rule of reason analysis was applicable:

> The gravamen of plaintiff's section 1 claim is that the complained of pre-termination acts by defendants caused it to be terminated by concerted actions of those defendants, thereby eliminating a competitive actor (DeLong) from the ranks of media distributors. . . .[A]lthough the complained of activities may have an *indirect* effect of price stabilization, there is no indication of direct effect on price necessary to a claim of price fixing which would be subject to the *per se* rule. . . . Here, there is no evidence of an agreement between BCS and Washington Mills to *directly* fix the price of media.

District Court Opinion (Appendix at 60). The District Court correctly focused on whether there was evidence of

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[2] DeLong distinguishes this case from cases involving agreements on *resale* prices. R. 5-100, at p. 5. Indeed, in its Motion to Reconsider, filed in the District Court, DeLong stated: "Whether there is evidence of agreement on the price to be charged to P&W [Pratt & Whitney] is irrelevant . . . ." R. 5-96, Memorandum, p. 3. Similarly, in its Opposition to Motion for Stay of Mandate in the Eleventh Circuit, DeLong states: "DeLong presented facts supporting a claim of conspiracy between a manufacturer and distributor to fix the *wholesale* price of goods to DeLong as a competing distributor. These claims are classic allegations of a vertical conspiracy over price." (emphasis added).

an agreement to fix the *resale* price to Pratt and other end-users of the special media, not the *wholesale* price at which Washington Mills sold the special media to DeLong or other distributors. Applying the rule of reason, the District Court held that DeLong could not make out a case and that summary judgment was therefore appropriate.

On appeal, the Court of Appeals agreed that DeLong could not establish a Sherman Section 1 claim under a rule of reason analysis, but reversed the grant of summary judgment on grounds that there was evidence of a "vertical price conspiracy" which would be *per se* illegal under Section 1. In so holding, the Court of Appeals stated that "[a] conspiracy to artificially inflate or 'pad' the price is a conspiracy to affect 'price or price levels'." 887 F.2d at 1507, n.11. The inflated "price" upon which the Court of Appeals focused was the *wholesale* price charged by Washington Mills, since there was no evidence that Washington Mills ever attempted to "fix" or control what any of the distributors charged on the resale level.[3]

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[3] The alleged price conspiracy involved Washington Mills' charging of 85 cents per pound for material that DeLong contended was identical to lower priced stock media. As the Court of Appeals noted, "The eighty-five cent price was the price quoted to the distributor, which then would mark up that price for resale to Pratt." *Washington Mills*, 887 F.2d at 1510, n. 15.

The Court of Appeals also found that ". . . Washington Mills' distributors competed, sometimes vigorously, for end-user customer accounts." *Id.*, at 1503. DeLong won all of the

(Continued on following page)

The question presented is whether in the absence of a further agreement to set, maintain or control *resale* prices, a manufacturer's alleged agreement with one of its distributors to establish the manufacturer's *wholesale* price for a particular product constitutes "vertical price-fixing" in *per se* violation of Section 1 of the Sherman Act. Under the controlling decisions of this Court, decisions of other Courts of Appeals and the leading authorities, the answer is clearly negative.

EXISTENCE OF FEDERAL JURISDICTION BELOW

The District Court had federal subject matter jurisdiction pursuant to 28 U.S.C. § 1331 as a result of the questions of federal law alleged by DeLong's claims under the Sherman Act, Sections 1 and 2, 15 U.S.C. § § 1, 2, the Robinson Patman Act, Section 13(a), 15 U.S.C. § 13(a) and the Clayton Act, 15 U.S.C. § 14. The District Court entered final judgment under Fed. R. Civ. P. 54(b) as to all claims pursued on the appeal. The Court of Appeals had appellate jurisdiction pursuant to 28 U.S.C. Section 1291, providing for appeals from final decisions.

(Continued from previous page)

bids for the Pratt business during the entire time it was a distributor, except for a bid that it lost to Paschal, a North Carolina distributor which was receiving the same wholesale price as DeLong but which bid a lower resale price because it was willing to accept a lower profit margin.

REASONS FOR GRANTING THE WRIT

The Opinion of the Eleventh Circuit Court of Appeals is in direct conflict with controlling authorities of this Court holding that vertical price-fixing in *per se* violation of Section 1 of the Sherman Act requires evidence of an agreement to set, maintain or control the ***resale*** price of a product. *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717, 108 S.Ct. 1515, 99 L.Ed.2d 808 (1988); *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 104 S.Ct. 1464, 79 L.Ed.2d 775 (1984); *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 97 S.Ct. 2549, 53 L.Ed.2d 568 (1977); *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373, 31 S.Ct. 376, 55 L.Ed. 502 (1911).

> [A]s a matter of definition, all antitrust rules condemning vertical price fixing categorically apply only to ***resale*** price fixing, not to all vertical contracts setting prices.

P. Areeda, VIII *Antitrust Law* at p. 260 (1989) (emphasis in original).

The Eleventh Circuit ruling in this case is also in direct conflict with decisions of other circuits holding that the only vertical price agreements which constitute "vertical price-fixing" in *per se* violation of Section 1 of the Sherman Act are those involving ***resale*** price-fixing, and that in dealer termination cases there must be evidence that the manufacturer and nonterminated dealer conspired to set or maintain **resale** prices and that other dealers were not free to set their own **resale** prices. *E.g.*, *Ryco Mfg. Co. v. Eden Services*, 823 F.2d 1215, 1228-30 (8th Cir. 1987), *cert. denied*, 108 S. Ct. 751 (1988); *McCabe's Furniture, Inc. v. La-Z-Boy Chair Co.*, 798 F.2d 323, 329-330 (8th Cir. 1986), *cert. denied*, 108 S. Ct. 1728 (1988) (For a terminated dealer to prevail on its *per se* claim for vertical

price-fixing, "the evidence must be sufficient for the jury to determine not merely that the manufacturer and nonterminated dealer conspired, but that they conspired to maintain resale prices." 789 F.2d at 329.); *Garment Dist., Inc. v. Belk Stores Services, Inc.*, 799 F.2d 905, 908-909 (4th Cir. 1986), *cert. denied*, 108 S. Ct. 1728 (1988); *Nat. Marine Electronic Distr. v. Raytheon Co.*, 778 F.2d 190, 193 (4th Cir. 1985); *Jack Walters & Sons Corp. v. Morton Bldg., Inc.*, 737 F.2d 698, 708 (7th Cir. 1984), *cert. denied*, 469 U.S. 1018 (1984); *Dunn v. Phoenix Newspapers, Inc.*, 735 F.2d 1184, 1186 (9th Cir. 1984); *Mesirow v. Pepperidge Farm, Inc.*, 703 F.2d 339, 341-42 (9th Cir.), *cert. denied*, 464 U.S. 820, 104 S.Ct. 83, 78 L.Ed.2d 93 (1983); *In re Coordinated Pretrial Proceedings In Petroleum Product Antitrust Litigation*, 691 F.2d 1335, 1343 (9th Cir. 1982), *cert. denied*, 464 U.S. 1068 (1984) ("Supplier actions that might influence resale prices but which do not sufficiently induce avoidance of price competition, however, do not constitute vertical price-fixing. [citations omitted] . . . To prevail in a vertical price-fixing claim, plaintiff's must show 'affirmative action' on the part of the oil companies which induced their dealers to charge certain prices. . . .They also must show that the dealer succumbed to such pressure. [citation omitted]." 691 F.2d at 1343.); *AAA Liquors, Inc. v. Joseph E. Seagram & Sons*, 750 F.2d 1203, 1205, 1207 (10th Cir. 1982) ("Manufacturers' price changes have the natural effect of raising or depressing the retail price, and long term contracts between manufacturers and wholesalers have the effect of stabilizing retail prices. They should not be deemed unlawful price fixing arrangements." 750 F.2d at 1207.); *Carlson Mach. Tools, Inc. v. American Tool, Inc.*, 678 F.2d 1253, 1261 (5th Cir. 1982); *Aladdin Oil Company v. Texaco, Inc.*, 603 F.2d 1107, 1118 (5th Cir. 1979) (There is no resale price maintenance

where there is no announcement of prices, no course of action undertaken or threatened contingent on the willingness or unwillingness of a distributor to adopt a suggested or stated price, and there is no meaningful event dependent on compliance or non-compliance with the suggested or stated price. 603 F.2d at 1118); *Sitkin Smelting & Refining Co., Inc. v. FMC Corporation*, 575 F.2d 440, 447 (3rd Cir. 1978), *cert. denied* 439 U.S. 866 (1978); *Butera v. Sun Oil Co., Inc.*, 496 F.2d 434, 437-38 (1st Cir. 1974); *Mowery v. Standard Oil Co. of Ohio*, 463 F. Supp. 762, 768 (N.D. Ohio 1976), *aff'd* 590 F.2d 335 (6th Cir. 1978). The Courts in these cases held that there is no vertical price-fixing in *per se* violation of the Sherman Act if the dealers or distributors are free to set or maintain their own retail or resale prices.

The Eleventh Circuit Court of Appeals in this case focused solely upon the language in *Business Electronics* to the effect that a vertical restraint is *per se* illegal if it includes some agreement on "price or price levels." 887 F.2d at 1506. What the Court of Appeals ignored, however, is that the "agreement on price or price levels" referred to in *Business Electronics* is an agreement regarding the *resale price to be charged by a distributor,* and does not extend to an agreement regarding *wholesale* price levels, even though such an agreement may have the incidental (or even foreseeable) effect of raising resale prices generally.

In *Business Electronics,* this Court stated as follows:

> Our approach to the question presented in the present case is guided by the premises of GTE Sylvania and Monsanto: that there is a

> presumption in favor of a rule-of-reason standard; that departure from that standard must be justified by demonstrable economic effect, such as the facilitation of cartelizing, rather than formalistic distinctions; that interbrand competition is the primary concern of the antitrust laws; and that rules in this area should be formulated with a view towards protecting the doctrine of GTE Sylvania.
>
> . . .
>
> There has been no showing here that an agreement between a manufacturer and a dealer to terminate a "price cutter", without a further agreement on the price or price levels *to be charged by the remaining dealer,* almost always tends to restrict competition and reduce output.

108 S. Ct. at 1520-21, 99 L.Ed.2d at 818 (emphasis added). *See United States v. Arnold Schwinn & Co.,* 388 U.S. 365, 376, 87 S.Ct. 1856, 1864, 18 L.Ed.2d 1249 (1967) (unlawful vertical price fixing is "the fixing of prices at which *others* may sell.") (emphasis added).

There was no evidence in this case of any agreement regarding prices to be charged by anyone other than Washington Mills. There was no evidence of any agreement regarding resale prices or price levels to be charged by BCS. Indeed, DeLong's contention is that the very purpose of the "conspiracy" to inflate Washington Mills' *wholesale* price was to build in a margin for Washington Mills to share with BCS, since BCS, which developed the products and got them approved by Pratt, was *unable* to compete for resale of the media to the Pratt & Whitney

Columbus plant, due to Pratt's 24 hour delivery requirements.[4]

There was no evidence that Washington Mills ever attempted to dictate resale prices of Delong or any other distributor. DeLong's own sales manager testified as follows:

> Q. . . . Washington Mills didn't tell you what to charge Pratt & Whitney, didn't force you to charge a particular price, did they?
>
> A. No, sir.
>
> Q. They had nothing to do with your price to Pratt & Whitney?
>
> A. That's correct.
>
> Q. And that would be true to any customer?
>
> A. They just gave us a list price of their items; that's true.
>
> Q. . . . What's true is that Washington Mills, during the entire time that you bought media from them, did not dictate or tell you what you had to charge to a customer of yours?
>
> A. That's true.
>
> Q. You're free to determine that yourself?
>
> A. That's true.

R. 4-80-Dickey Deposition, at pp. 78-79.

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[4] BCS was not able to bid on the Columbus business because of the delivery requirements. R. 1-7, Supp. Aff. of Harold DeLong, para. 17(c), p. 9. *See, e.g.*, Brief of Appellant DeLong, at p. 36: "When DeLong declined to share the Pratt business with BCS, WM and BCS established the Washington Mills kickback to BCS of the excess price . . . ."

The Court of Appeals' finding of a *per se* illegal "vertical price agreement" is apparently premised on the theory that an agreement setting a higher *wholesale* price would logically tend to result in higher price levels for the affected products on the resale level. However, as one of the leading commentators has noted:

> The wholesale price necessarily affects the retail price: at a minimum, the wholesale price acts as a floor below which the retail price cannot fall if the dealer is to remain profitable. Yet it is clear that a wholesale price or any general change in it is not a "price fix" in the *Dr. Miles* sense; otherwise every wholesale price would be illegal – an obviously senseless result.

P. Areeda, VIII *Antitrust Law* at p. 316 (1989). Areeda concludes that " . . . notwithstanding its impact on resale prices, a regular or temporary wholesale price or any change in it applicable to all dealers does not amount to vertical price fixing under the Sherman Act." *Id.* at p. 317. Areeda further states it is an "indisputable premise" that "the vertical price-fixing concept cannot embrace the ordinary wholesale price, notwithstanding its inherent influence on dealer decisions about resale prices." *Id.*

Professor Areeda's observations are in accord with the judicial opinions that have considered the question of allegations of vertical "price-fixing" involving wholesale price levels. Vertical price-fixing is an agreement to fix *resale* prices to third parties. Courts have uniformly refused to find vertical price-fixing where only *wholesale* prices are fixed by the supplier's agreement.

In *Butera v. Sun Oil Company, Inc.*, 496 F.2d 434 (1st Cir. 1974), the court held that allegations that Sun Oil

attempted to force dealers to charge particular retail prices by manipulating the wholesale price until compliance was achieved did not constitute resale price maintenance. The court stated, "[A] producer's tight control over its wholesale prices does not become resale price maintenance merely because retail outlets to which it sells, being highly competitive and selling at low margins, are sensitive to every change in wholesale prices. . . . [S]uch economic impact as follows from [a supplier's] tight control of its own wholesale pricing is not a Sherman Act violation." *Id.* at 437-38.

In *Mesirow v. Pepperidge Farm, Inc.*, 703 F.2d 339 (9th Cir.), *cert. denied*, 464 U.S. 820, 104 S.Ct. 83, 78 L.Ed.2d 93 (1983), the Ninth Circuit held that Section 1 of the Sherman Act is not violated where only wholesale prices are fixed and the plaintiff is not bound to sell to customers at prices specified by the defendant. *See also Pennsylvania Dental Assoc. v. Medical Service Assoc. of Pennsylvania*, 745 F.2d 248, 259 (3rd Cir. 1984), *cert. denied*, 471 U.S. 1016 (1985) ("The Supreme Court has not condemned vertical price-fixing outside of the resale price maintenance context."); *Kellam Energy, Inc. v. Duncan*, 668 F.Supp 861 (D. Del. 1987); *Taggert v. Rutledge*, 557 F.Supp 1420, 1441 (D. Mont. 1987), *aff'd*, 852 F.2d 1290 (9th Cir. 1988) (unreported appellate decision, text in Westlaw).

In *Carlson Mach. Tools, Inc. v. American Tool, Inc.*, 678 F.2d 1253 (5th Cir. 1982), the Fifth Circuit Court of Appeals stated as follows:

> Resale price maintenance occurs " 'when a price is announced and some course of action is undertaken or threatened contingent on the willingness or unwillingness of the retailer to adopt the price. . . . [Resale price maintenance]

> must involve making a meaningful event depend on compliance or non-compliance with the "suggested" or stated price.' " *Aladdin Oil, supra,* 603 F.2d at 1117-18 (*quoting Butera v. Sun Oil Company,* 496 F.2d 434, 437 (1st Cir. 1974)). Evidence of exposition, persuasion, argument, or pressure on the part of the manufacturer is insufficient, without more, to establish coercion required for resale price maintenance. *Yentsch v. Texaco, Inc.,* 630 F.2d 46, 53 (2d Cir. 1980).

Carlson Mach. Tools, 678 F.2d at 1261. The Fifth Circuit rejected Carlson's attempt to characterize its termination as a result of its objection to the manufacturer's suggested retail price policy when in fact (as in the case at bar) the gravamen of the distributor's complaint was the wholesale price it had to pay, not the price at which it resold the goods:

> Nevertheless, Carlson wishes to characterize its termination as a result of its objection to American's suggested retail price policy merely because the [wholesale] price increase would be reflected in the suggested retail price. This putative characterization does not raise an issue of fact as to resale price maintenance: the dispute between Carlson and American concerning the American lathes had nothing to do with American's policy of suggesting retail prices – the dispute was concerned only with the price that *Carlson* would have to pay American for its stock, and Carlson's belief that American breached its purchasing agreement by raising the price of the lathes.

678 F.2d at 1261 (emphasis in original).

The Court of Appeals in the case at bar concluded, without further analysis, that a vertical agreement to "pad" the wholesale price of Washington Mills media is

"vertical price-fixing", and therefore illegal *per se*. This literal approach is in conflict with the controlling authorities. As this Court stated in *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1, 8, 99 S.Ct. 551, 60 L.Ed.2d 1 (1979), "easy labels do not always supply ready answers." The Court further stated:

> Literalness is overly simplistic and often overbroad. When two partners set the price of their goods or services, they are literally "price fixing", but they are not per se in violation of the Sherman Act. Thus, it is necessary to characterize the challenged conduct as falling within or without that category of behavior to which we apply the label "per se price fixing."

Id., 441 U.S. at 9-10. An agreement between a manufacturer and a distributor setting the *wholesale* price for a manufacturer's product – whether artificially "inflated" or not – is simply not within the category of behavior to which this Court and other Courts of Appeals have applied the label "*per se* price fixing". In order to constitute vertical price fixing within the scope of Section 1 of the Sherman Act there must be an agreement, restraint or restriction with respect to the price at which distributors must *resell* the product.

There was no evidence in this case of an agreement to fix *resale* prices. Accordingly, this Court should grant *certiorari* to correct the erroneous application of a *per se* vertical price-fixing analysis by the Eleventh Circuit Court of Appeals.

CONCLUSION

For the foregoing reasons, this Court should grant Petitioners' petition for a writ of *certiorari* to resolve any conflict with regard to this Court's decisions and the decisions of other Courts of Appeals, that in the absence of an agreement to set, maintain, fix or control the ***resale*** price of a particular product by distributors, a manufacturer's alleged agreement with one of its distributors to establish the manufacturer's ***wholesale*** price for the product does not constitute vertical price-fixing in *per se* violation of Section 1 of the Sherman Act.

DATED: February 9, 1990
Atlanta, Georgia

Respectfully submitted,

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APPENDIX

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DeLONG EQUIPMENT COMPANY,
Plaintiff-Appellant,

v.

WASHINGTON MILLS ABRASIVE COMPANY, et al.,
Defendants-Appellees.

No. 88-8664.

United States Court of Appeals,
Eleventh Circuit.

Nov. 13, 1989.

William E. Sumner and David A. Webster, Sumner & Hewes, Atlanta, Ga., for plaintiff-appellant.

Paul Webb, Jr. and Philip S. Coe, Webb & Daniel, Atlanta, Ga., for defendants-appellees.

Appeal from the United States District Court for the Northern District of Georgia.

Before VANCE and ANDERSON, Circuit Judges, and ATKINS*, Senior District Judge.

ANDERSON, Circuit Judge:

Plaintiff-appellant DeLong Equipment Company ("DeLong") brought this action against Washington Mills Abrasive Company, its wholly-owned subsidiary Washington Mills Ceramic Corporation (collectively referred to as "Washington Mills" unless otherwise noted), B.C.S. Company, Inc. ("BCS"), and several individuals alleging violations of the federal antitrust laws as well as pendent state law claims. The district court granted partial summary judgment in favor of the defendants, and DeLong

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* Honorable C. Clyde Atkins, Senior U.S. District Judge for the Southern District of Florida, sitting by designation.

appeals. Because we find that DeLong has raised genuine issues of material fact regarding several issues, we reverse and remand the case for trial.

I. BACKGROUND

A. *Facts*

Plaintiff DeLong, a Georgia corporation wholly owned by Harold DeLong, is a distributor of vibratory equipment and supplies used to polish and deburr metal parts in industrial manufacturing processes. The key product in this process is an abrasive metal finishing substance known as "media." In the manufacturing process, metal parts for products such as automobiles or airplanes are cut from sheets of metal and placed in vats or tubs containing media. The containers are then vibrated, causing the media to rub against the metal parts, removing any rough edges and giving the piece a polished finish.

Finishing media can be readily available natural products such as corn cobs or sand, or can be specialized products such as liquid chemicals, glass beads, steel balls, ceramic shapes, or plastic chips. The media in this case is known as "preformed ceramic media," and is used, among other things, in the manufacture and refurbishing of jet aircraft engine blades. Preformed ceramic media consists of a blend of clays, sands, and polishing agents which is extruded through metal molds of different shapes, such as cylinders, stars, rectangles, or triangles, cut into the desired size, baked and dried. The material is packed by the manufacturer and shipped either to distributors or directly to end-user customers by common

carrier. The role of the distributor is to consult with the user of media and to advise the user of the appropriate equipment, media, vibratory power, speed, and time period.

Washington Mills Abrasive Company, located in North Grafton, Massachusetts, has been in the abrasive finishing business since 1868. Washington Mills is a manufacturer-supplier and occasional distributor of media.[1] Washington Mills's media is manufactured by its wholly-owned subsidiary, Washington Mills Ceramic Corporation, located in Lake Wales, Florida. Washington Mills approved DeLong as a distributor in September 1982.[2]

Defendant BCS, located in Thompson, Connecticut, is also a distributor of media, engaged in a business virtually identical to DeLong's. BCS has been a distributor of Washington Mills products since the early 1980s, and was Washington Mills's primary distributor in the northeast during all times relevant to this litigation.[3] Neither DeLong nor BCS manufacture media, but both distribute media manufactured by others, including Washington Mills.

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[1] Washington Mills sells its media primarily through its network of distributors. It does sell some media directly to end-user customers, but it is undisputed that such sales occurred only infrequently and outside Washington Mills's usual course of business during times relevant in this litigation.

[2] DeLong has been engaged in the sale and distribution of vibratory equipment and media for over twenty years, primarily in Georgia, Alabama, and South Carolina.

[3] BCS was dismissed as a party to this action after settlement.

As was its customary practice, Washington Mills did not enter into a written distributorship agreement with DeLong. Generally, Washington Mills distributors purchased media for resale at a wholesale discount of 25% off the list price for media. There was no provision in the arrangement between Washington Mills and DeLong for exclusive territories or franchise areas, and Washington Mills's distributors competed, sometimes vigorously, for end-user customer accounts. As a distributor of Washington Mills products, DeLong, along with all other Washington Mills distributors, received a standard price list showing the size, shape, composition, and price per pound for each kind of "stock" media regularly kept in Washington Mills's inventory. The price list also provided that customers could request specially made media, subject to minimum volume requirements and a requirement that the customer pay for a new die if one was required to produce the media. This "special" media was manufactured at the request of three or fewer customers without sufficient volume to be placed in regular inventory. "Special" media is not an inherently different product from Washington Mills's "stock" media or from media manufactured by other companies.

Defendant Peter Williams is the president and controlling shareholder of Washington Mills. Defendant John Williams, no relation to Peter, is general sales manager of Washington Mills as well as an officer of the corporation. Defendant Hans van der Sande was Washington Mills's southeast regional sales manager[4] during the time

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[4] Florida, Georgia, Alabama, Mississippi, Tennessee, North Carolina, South Carolina, and eastern Arkansas comprised Washington Mills's southeast sales region.

material to this action. He was responsible for processing orders and arranging shipments to distributors, and also dealt with distributor complaints. Defendant Robert Baldauf was regional sales representative for Washington Mills in the southeast. Baldauf visited dealers, ascertained their product needs, and transmitted this information to van der Sande at Washington Mills's home office.

Pratt & Whitney Aircraft Division of United Technologies Corporation ("Pratt") is not a party to this action, but its role has been crucial throughout. Pratt is one of Washington Mills's largest end-user customers. Pratt manufactures aircraft engines, and ceramic preformed media are used in the production of jet engine blades. Pratt's engineering department tests and approves the use of certain materials in its manufacturing process and issues specifications used by its purchasing department in soliciting bids for these products. These specifications appear on product material control dockets, or "PMCs." Except for extraordinary situations not relevant here, Pratt's purchasing department may only purchase items specified on the PMCs, and materials delivered to Pratt must have the PMC number stamped on the box. PMCs are important to Pratt because it wants to ensure that both the product which was tested and the supplier of that product remain constant. Pratt considers the PMC number an attestation that the product is identical to the product that Pratt approved for its manufacturing process. Pratt not only buys media for its manufacturing of jet engine blades, but also instructs other companies purchasing Pratt engines to use the same media in refurbishing engine blades.

In the late 1970s and early 1980s, Pratt was planning a new production facility. Initially the facility was to be located in the northeast, but Pratt ultimately built the plant in Columbus, Georgia in 1983. In the years preceding Pratt's construction of its Columbus facility, Pratt engineers in Connecticut had engaged in a business relationship with BCS. BCS was a supplier of tumbling media and other products to Pratt's East Hartford, Connecticut plant at that time. Defendants William Biebel and his son, Robert Biebel, were the principals of BCS who dealt with Pratt's engineers. During Pratt's development process of a new jet engine to be manufactured in Georgia, BCS helped Pratt test vibratory equipment and tumbling media until a satisfactory process was found. After testing media from several manufacturers, including Washington Mills, James Neil, a Pratt engineer, requested that a PMC be issued for three of the Washington Mills media furnished by BCS during the development process.

This PMC specified BCS as the "manufacturer" of the media, and identified various media as "BCS Specials." William Biebel of BCS testified that BCS tried to have an end-user customer approve a product with the BCS label rather than the manufacturer's label. This labeling ensured that BCS would retain the sales of the product and not be undercut by a competing distributor of the same media.

Initially, Washington Mills distributed its media to Pratt's Columbus plant through BCS. Pratt required a twenty-four hour commitment for delivery to the Columbus plant, however, and BCS did not have facilities nearby to service the plant properly. When it became

aware of BCS's inability to service Pratt in Columbus, DeLong became attracted to the lucrative account.

DeLong received an invitation to bid in 1982 which listed BCS as the manufacturer of the media, and DeLong informed Pratt that BCS did not manufacture media but was a distributor like DeLong. Harold DeLong asked for a sample of the media in question, and his examination of the media suggested that it was stock media manufactured by Washington Mills. DeLong repeatedly complained to Washington Mills that the higher priced media being sold to Pratt was exactly the same as Washington Mills's stock media, and that therefore the price should have been lower.

DeLong made a bid in response to Pratt's 1982 invitation, and was the successful bidder. DeLong leased a warehouse in Columbus, and supplied Washington Mills's media to Pratt until Washington Mills terminated its distributorship in August 1985.

B. *Procedural History*

After being terminated by Washington Mills, DeLong brought this action in February, 1986, alleging violations of sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2; section 2 of the Clayton Act as amended by section 1 of the Robinson-Patman Act, 15 U.S.C. § 13(a); section 3 of the Clayton Act, 15 U.S.C. § 14; and various violations of Georgia law, including breach of contract, tortious interference with business relationships, fraud, deceit, and misrepresentation.

In its complaint, DeLong alleged, *inter alia,* that it was terminated for failing to participate in a scheme between Washington Mills and BCS to fix the price of media, particularly media sold to Pratt. Washington Mills asserted that it terminated DeLong's distributorship because DeLong's employees were abusive to Washington Mills personnel and DeLong was behind in its payments. DeLong also alleged that after it was terminated by Washington Mills, Washington Mills used customer lists and other information to attempt to disuade DeLong customers from continuing to deal with DeLong.[5] DeLong's customer lists were available to Washington Mills because shipments from Washington Mills's manufacturing site in Lake Wales, Florida, were "drop shipped" directly to DeLong's customers.

The district court dismissed defendants Robert Biebel, William Biebel, and BCS for lack of personal jurisdiction. This court affirmed the dismissal of William, but reversed the dismissal of Robert and BCS. *DeLong Equipment Co. v. Washington Mills Abrasive Co.,* 840 F.2d 843 (11th Cir. 1988). On remand after extensive discovery, the district court granted the remaining defendants' motion for summary judgment on all counts except some aspects of DeLong's Robinson-Patman Act count. *DeLong Equipment Co. v. Washington Mills Abrasive Co.,* No. 1:86-CV-275-GET (N.D.Ga. June 16, 1988) ("District Court Order"). The district court certified its grant of summary

[5] The parties have entered into court-approved protective orders to protect confidential customer information in this litigation.

judgment under F.R.Civ.P. 54(b), and this appeal followed.

C. *Standard of review*

This court reviews the district court's grant of summary judgment *de novo. McGahee v. Northern Propane Gas Co.*, 858 F.2d 1487, 1492-93 (11th Cir.1988), *cert. denied*, ___ U.S. ___, 109 S.Ct. 2110, 104 L.Ed.2d 670 (1989). Summary judgment is appropriate only if the pleadings and evidence in the record demonstrate that there is no genuine issue of material fact as to any issue and that the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48, 106 S.Ct. 2505, 2509-10, 91 L.Ed.2d 202 (1986). On summary judgment, the reasonable inferences to be drawn from the facts must be viewed in the light most favorable to the party opposing the motion. *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587-88, 106 S.Ct. 1348, 1356-57, 89 L.Ed.2d 538 (1986), *quoting United States v. Diebold, Inc.*, 369 U.S. 654, 655, 82 S.Ct. 993, 994, 8 L.Ed.2d 176 (1962). The nonmoving party, however, "must present affirmative evidence in order to defeat a properly supported motion for summary judgment," *Anderson*, 477 U.S. at 257, 106 S.Ct. at 2514, and must show "that there is a genuine issue for trial." *Matsushita*, 475 U.S. at 587, 106 S.Ct. at 1356; *Dunnivant v. Bi-State Auto Parts*, 851 F.2d 1575, 1579 (11th Cir. 1988).

It is the substantive law, however, that identifies those facts that are material. *Anderson*, 477 U.S. at 248, 106 S.Ct. at 2510. The Supreme Court recently has endorsed the use of summary judgment in antitrust cases in order

to avoid chilling legitimate competitive behavior, *Matsushita*, 475 U.S. at 594, 106 S.Ct. at 1360; *McGahee*, 858 F.2d at 1493, and has articulated specific rules which make summary judgment more readily available in cases alleging violations of section 1 of the Sherman Act. *H.L. Hayden Co. of New York, Inc. v. Siemens Medical Systems, Inc.*, 879 F.2d 1005, 1012 (2d Cir.1989). We address those rules more fully in the context of our discussion of DeLong's section 1 claim.

II. SHERMAN ACT CLAIMS

A. *Applicable law*

The first count in DeLong's complaint alleges a conspiracy in violation of section 1 of the Sherman Act.[6] DeLong contends (1) that the defendants conspired to fix prices of media sold to Pratt by designating ordinary media as "special" media and selling it at an artificially inflated price to Pratt; and (2) that DeLong's distributor relationship with Washington Mills was terminated in furtherance of that conspiracy.

Restraints on competition that may violate section 1 fall into two broad categories, horizontal and vertical.

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[6] Section 1 of the Sherman Act, in pertinent part, provides that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." 15 U.S.C. § 1.

DeLong also alleged violations of section 2 of the Sherman Act and section 3 of the Clayton Act. The district court granted summary judgment in favor of the defendants on these claims, and DeLong has not contested that ruling on appeal.

Vertical restraints occur between entities at different levels of distribution in order to control the price or path of a product after the product leaves the manufacturer, while restraints between competitors at the same level of distribution are characterized as horizontal. *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717, ___, 108 S.Ct. 1515, 1522-23, 99 L.Ed.2d 808 (1988). While the boundary between vertical and horizontal restraints is sometimes unclear, *see Business Electronics*, 485 U.S. at ___ n. 4, 108 S.Ct. at 1528 n. 4 (Stevens, J., dissenting), it is undisputed that the termination of DeLong, a distributor, by Washington Mills, a manufacturer, poses a vertical restraint problem. District Court Order 10; *Valley Liquors, Inc. v. Renfield Importers, Ltd.*, 822 F.2d 656, 660 n. 5 (7th Cir.) ("[a]lleged price fixing between a manufacturer and distributors [is] properly termed a 'vertical' conspiracy"), *cert. denied*, 484 U.S. 977, 108 S.Ct. 488, 98 L.Ed.2d 486 (1987); *see Construction Aggregate Transport, Inc. v. Florida Rock Industries, Inc.*, 710 F.2d 752, 778 (11th Cir.1983) ("key inquiry when determining whether a particular arrangement is horizontal or vertical is not the presence of a conspirator on the plaintiff's market level ('horizontal' to the plaintiff) but whether the conspiratorial agreement is *between* entities which are *horizontally arranged* at some level in the market") (emphasis in original) (footnote omitted).[7]

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[7] The Supreme Court has expressly rejected the possibility, suggested by DeLong, that this vertical conduct can be construed as horizontal because some of its effects may be horizontal. *Business Electronics*, 485 U.S. at ___, 108 S.Ct. at 1523 n. 4.

Vertical restraints may be price or non-price in nature. Supreme Court decisions from *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373, 31 S.Ct. 376, 55 L.Ed. 502 (1911), to *Business Electronics* have left the area of vertical price restraints relatively settled. Express agreements or practices implying an agreement to maintain resale prices are *per se* illegal under section 1 of the Sherman Act. As the Court recently reaffirmed in *Business Electronics*, "a vertical restraint is not illegal *per se* unless it includes some agreement on price or price levels." 485 U.S. at ___, 108 S.Ct. at 1525.

Per se rules of illegality are the exception in antitrust analysis and are appropriate only when they relate to conduct that is manifestly anticompetitive. *Business Electronics*, 485 U.S. at ___, 108 S.Ct. at 1519. As the Court explained in *Northern Pacific Railway Co. v. United States*, 356 U.S. 1, 5, 78 S.Ct. 514, 518, 2 L.Ed.2d 545 (1958), "there are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use." Since the Court decided *Dr. Miles* in 1911, vertical price agreements have been deemed to have such a pernicious effect on competition that *per se* illegality is warranted.[8]

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[8] Recent vertical restraint decisions indicate that the Supreme Court now requires a higher threshold of proof of joint action in a vertical price fixing case in order to invoke *per se* illegality, not a relaxation of the settled rule that vertical

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The Court in *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 760-61, 104 S.Ct. 1464, 1469, 79 L.Ed.2d 775 (1984), set forth the legal standard governing distributor termination cases:

> This Court has drawn two important distinctions that are at the center of this and any other distributor-termination case. First, there is the basic distinction between concerted and independent action – a distinction not always clearly drawn by parties and courts. Section 1 of the Sherman Act requires that there be a 'contract, combination . . . or conspiracy' between the manufacturer and other distributors in order to establish a violation. 15 U.S.C. § 1. Independent action is not proscribed. A manufacturer of course generally has a right to deal, or refuse to deal, with whomever it likes, as long as it does so independently. *United States v. Colgate & Co.*, 250 U.S. 300, 307, 39 S.Ct. 465, 468, 63 L.Ed. 992 (1919); *cf. United States v. Parke, Davis & Co.*, 362 U.S. 29, 80 S.Ct. 503, 4 L.Ed.2d 505 (1960). Under *Colgate*, the manufacturer can announce its resale prices in advance and refuse to deal with those who fail to comply. And a distributor is free to acquiesce in the manufacturer's demand in order to avoid termination.

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price agreements are *per se* illegal. *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 760-61, 104 S.Ct. 1464, 1469, 79 L.Ed.2d 775 (1984) (reaffirming rule that vertical price restraints are *per se* illegal while non-price restrictions are subject to the rule of reason).

> The second important distinction in distributor-termination cases is that between concerted action to set prices and concerted action on non-price restrictions. The former have been *per se* illegal since the early years of national antitrust enforcement. *See Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373, 404-09, 31 S.Ct. 376, 383-85, 55 L.Ed. 502 (1911). The latter are judged under the rule of reason, which requires a weighing of the relevant circumstances of a case to decide whether a restrictive practice constitutes an unreasonable restraint on competition. *See Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 97 S.Ct. 2549, 53 L.Ed.2d 568 (1977).

465 U.S. at 760-61, 104 S.Ct. at 1469 (footnoted omitted).

Under the rule of reason, the fact-finder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition. *GTE*, 433 U.S. at 49, 97 S.Ct. at 2557. The burden of proving unreasonable effects on competition in a rule of reason case rests with the antitrust plaintiff. *Kentucky Fried Chicken Corp. v. Diversified Packaging Corp.*, 549 F.2d 368, 380 (5th Cir. 1977).[9] Among other things, this means that the plaintiff must allege and prove that the defendants' conduct had a significant anticompetitive effect in a defined product market. *L.A. Draper & Son v. Wheelabrator-Frye, Inc.*, 735 F.2d 414, 422-23 (11th Cir.1984); *Graphic Products Distributors, Inc. v. Itek Corp.*, 717 F.2d 1560, 1573 (11th Cir.1983);

[9] This case was decided prior to the close of business on September 30, 1981, and is binding precedent under *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir.1981).

Kestenbaum v. Falstaff Brewing Corp., 575 F.2d 564, 571 (5th Cir.1978), *cert. denied*, 440 U.S. 909, 99 S.Ct. 1218, 59 L.Ed.2d 457 (1979).

The district court concluded that the restraints at issue here were non-price in nature, and hence applied a rule of reason analysis. District Court Order 10-11. The court misconceived DeLong's position and focused on the indirect effect on price which the termination of the DeLong distributorship may have had. The court, applying the rule of reason, held that DeLong had not carried its burden of defining a relevant market and granted summary judgment to defendants accordingly. On appeal, DeLong candidly concedes that it has not alleged and cannot prove the facts required to establish a prima facie rule of reason case under the law of this circuit.[10]

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[10] DeLong attempts to circumvent the factual showing of market power and diminution of competition required under the rule of reason by citing *NCAA v. Board of Regents of the University of Oklahoma*, 468 U.S. 85, 104 S.Ct. 2948, 82 L.Ed.2d 70 (1984). Once an antitrust plaintiff has adduced evidence demonstrating defendants' imposition of price restraints, according to DeLong, *NCAA* stands for the proposition that the defendants must come forth with "some competitive justification even in the absence of a detailed market analysis." 468 U.S. at 109-10 n. 42, 104 S.Ct. at 2964-65 n. 42. Under this interpretation of *NCAA*, DeLong contends that because it has shown a "naked restriction on price" within the meaning of *NCAA*, it is not required to adduce evidence of market power.

This is a tortured reading of *NCAA*. In *NCAA*, the fact that the NCAA possessed power in the collegiate sports television market was obvious. The thrust of the Court's discussion upon which DeLong relies is actually to the effect that where "[a]s a

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In order for DeLong to prevail on this appeal, then, it must demonstrate that genuine issues of material fact exist as to vertical price agreements which would be *per se* illegal under section 1. We believe that the district court's conclusion that the alleged restraints were non-price in nature overlooked evidence of a conspiracy to fix the price of media sold to Pratt; we conclude that DeLong has presented sufficient evidence of a vertical *price* conspiracy to survive defendants' motion for summary judgment.[11] DeLong has presented substantial evidence, creating genuine issues of material fact, of a conspiracy to fix the price of media sold to Pratt and termination of DeLong's distributorship pursuant to the conspiracy.[12] We now turn to that evidence.

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factual matter, it is evident that petitioner does possess market power," 468 U.S. at 111, 104 S.Ct. at 2965, a lengthy economic analysis of market power is unnecessary. DeLong has made no showing that Washington Mills's market power, if any, is "evident," and therefore DeLong's argument based on *NCAA* is without merit.

[11] A conspiracy to artifically inflate or "pad" the price is a conspiracy to affect "price or price levels." *Business Electronics*, 485 U.S. at ___, 108 S.Ct. at 1525; *County of Oakland v. City of Detroit, 866 F.2d 839, 841, 850 (6th Cir.1989); National Marine Electronic Distributors, Inc. v. Raytheon Co.*, 778 F.2d 190, 193 (4th Cir.1985) (in order to conspire to restrain resale price competition there must be "some agreement to set, control, fix, maintain, or stabilize prices"). Washington Mills does not argue otherwise.

[12] Delong also alleged that Washington Mills illegally divided market territories and specific customers among its distributors, and that DeLong's failure to respect those

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B. *DeLong's Allegations of a Vertical Price Conspiracy*

In order to survive the defendants' motion for summary judgment, DeLong must adduce facts that tend to show a conspiracy to set prices and that DeLong was terminated pursuant to that conspiracy.[13] Antitrust law, however, "limits the range of permissible inferences from ambiguous evidence" in a case under section 1 of the Sherman Act. *Palmer v. BRG of Georgia, Inc.*, 874 F.2d 1417, 1422 (11th Cir.1989). In *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 104 S.Ct. 1464, 79 L.Ed.2d 775 (1984), the Court set forth the standard by which to judge the sufficiency of the evidence of an agreement to restrain trade in a dealer termination case:

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divisions was another factor leading to its termination in August 1985. Territorial restrictions, *L.A. Draper & Son v. Wheelabrator-Frye, Inc.*, 735 F.2d 414, 422 n. 13 (11th Cir.1984), and exclusive dealing arrangement, *Midwestern Waffles, Inc. v. Waffle House, Inc.*, 734 F.2d 705, 711 (11th Cir.1984), are nonprice vertical restraints and therefore reviewed under the rule of reason. *GTE*, 433 U.S. at 49, 97 S.Ct. at 2557. Because DeLong concedes that its evidence is insufficient to sustain rule of reason scrutiny, *see supra*, we need not address these contentions.

[13] The district court assumed for summary judgment purposes, but did not decide, that DeLong presented sufficient evidence of joint action. District Court Order 10. It did not need to reach the issue of whether a vertical agreement existed because it characterized the restraints at issue as nonprice in nature and therefore applied a rule of reason analysis. Because we believe that the restraints at issue are more appropriately characterized as vertical *price* restraints, *see supra*, we must address the question whether DeLong has presented sufficient evidence of conspiracy to survive a motion for summary judgment.

> [T]here must be evidence that tends to exclude the possibility of independent action by the manufacturer and distributor. That is, there must be direct or circumstantial evidence that reasonably tends to prove that the manufacturer and others had a conscious commitment to a common scheme designed to achieve an unlawful objective.

465 U.S. at 768, 104 S.Ct. at 1473. In *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986), the Court held that a non-moving party who seeks to defeat a summary judgment motion "must show that the inference of conspiracy is reasonable in light of the competing inferences of independent action or collusive action that could not have harmed" the non-moving party. 475 U.S. at 588, 106 S.Ct. at 1356-57. The Summary judgment standard in vertical restraint cases is more stringent than in other areas of antitrust law because a higher possibility of capturing and invalidating legitimate business conduct exists. In *Helicopter Support Systems, Inc. v. Hughes Helicopter, Inc.* 818 F.2d 1530 (11th Cir.1987), this court combined the *Monsanto and Matsushita* rules into a two-part test applicable to distributor termination cases where the plaintiff alleges that it was terminated due to a collusive price-fixing agreement between a manufacturer and its distributors:

> First, the plaintiff must satisfy the court that the conspiracy which he alleges is, objectively, an economically reasonable one. *Matsushita* dictates that if the alleged conspiracy is economically infeasible or irrational then, as a matter of law, summary judgment must be entered against the plaintiff. Second, the plaintiff in a distributor-termination case must also be able to point to evidence which tends to exclude the possibility that the manufacturer was

> operating independently in making his determination to terminate the distributor. Mere complaints from other competing distributors are not sufficient in this regard since they are equally consistent with both an independent and a collusive interpretation. The distributor must, instead, adduce positive evidence which tends to exclude the possibility of unilateral action.

818 F.2d at 1534 (footnote omitted).

We need not pause long at the first *Helicopter* requirement – the conspiracy DeLong alleges is eminently reasonable. BCS, Washington Mills, and DeLong (if it participated) all stood to gain economically by this arrangement. If DeLong's version of events is true. BCS in fact received its portion of the benefits of the scheme in the form of payments to its offshore affiliate, Wood & Thompson, which we discuss below. Termination of a distributor, DeLong, who refused to participate in the scheme is also economically reasonable. This case does not involve economically questionable behavior such as the predatory pricing scheme at issue in *Matsushita*. *See Winn v. Edna Hibel Corp.*, 858 F.2d 1517, 1520 (11th Cir.1988).

In order to satisfy the second prong of the *Helicopter* inquiry, DeLong must show evidence of concerted action. This evidence "need not be such that *only* an inference of conspiracy may be derived from it. If must, however, go beyond equivocal complaints and *tend* to exclude the inference of independent action." *Helicopter*, 818 F.2d at 1534 n. 4 (emphasis in original). We must determine whether a reasonable trier of fact might conclude from the evidence presently before us that Washington Mills and BCS engaged in an illegal conspiracy in restraint of

trade. *See Helicopter*, 818 F.2d at 1535 n. 5. We believe that DeLong has satisfied its burden. We now turn to specific evidence adduced by DeLong that tends to show (1) that Washington Mills and BCS conspired to add a premium to the price of "special" media going to Pratt, although that media was identical to stock media; and (2) that DeLong's distribution arrangement with Washington Mills was terminated in furtherance of that conspiracy.

1. BCS/Washington Mills Conspiracy

(a) Evidence that "Special" Media was Identical to "Stock" Media

DeLong's allegations of a vertical price conspiracy center on the sale of media to Pratt. DeLong argues that BCS and Washington Mills conspired and combined to inflate the price of Washington Mills's standard media by labeling it "special" and charging Pratt a significantly higher price than Washington Mills's list price for identical media. The Washington Mills media sold to Pratt was designated as "special," and was assigned numbers indicating its intended use. DeLong adduced evidence that this "special" media was actually "generic" media; i.e., media that Washington Mills regularly produced and carried in stock, and that special media did not differ in size, shape, or composition from the media regularly stocked by Washington Mills. The increased price charged by Washington Mills for this product, DeLong asserted, was not justified by any cost differential.

The defendants now admit that the "special" media is not inherently different from Washington Mills's stock media. The media manufactured by Washington Mills for

Pratt was "special" media known as P & W 5000, P & W 6000, and P & W 7000.[14] The defendants claim that these products were not listed on the price list nor carried in Washington Mills's regular inventory and that Washington Mills exercised a higher degree of quality and inventory control over the media sold to Pratt. However, two of these products, P & W 6000 and P & W 7000, are identified as stock media on Washington Mills June, 1983 and April, 1982 price lists.

The stock items were sold to distributors at sixty-six cents per pound, less the twenty-five percent discount. Except for a few instances, the details of which are in dispute, Washington Mills quoted DeLong a wholesale price of eighty-five cents per pound for each of the Pratt items.[15] P & W 5000 is not listed on a stock Washington Mills price list, but Washington Mills records suggest that this item was carried in inventory at all times and sold to customers other than Pratt. Moreover, Washington Mills has sold all three types of "Pratt" media to other customers, and a BCS employee has stated that the only

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[14] P. & W 5000, PMC 3175-1, is a 7/8 x 7/8 tetrahedron pyramid, 20 bond. P & W 6000, PMC 3179-1, is a 5/7 x 5/8 angle-cut triangle, 25 degrees, 20 bond. P & W 7000, PMC 3178-1, is a 5/8 x 1/4 angle-cut triangle, 25 degrees, 20 bond.

[15] The eighty-five cent price was the price quoted to the distributor, which then would mark up that price for resale to Pratt. DeLong's initial successful bid to Pratt was $1.11 per pound for PMC 3175-1 and 3179-1 and $1.13 for PMC 3178-1. The exact prices paid for "special" media during the course of DeLong's relationship with Washington Mills are a subject of dispute between the parties, but it is clear that at all times the media sold to Pratt was priced substantially higher than Washington Mills's standard media.

difference between such media sold to Pratt and to other customers is the labeling, i.e., the PMC number stamped on the Pratt boxes. (Robert Biebel Dep. 121-28). DeLong also points to at least two instances where Washington Mills shipped media directly to Pratt in boxes which only carried the PMC number required by Pratt, and did not identify the manufacturer of the media as Washington Mills.

DeLong has made a strong showing that the so-called "special" media (sold at a high price of eighty-five cents per pound) was identical to media carried in Washington Mills's regular inventory and sold to other customers at lower prices. There is at least a genuine issue of fact as to whether the "special" media is identical to the lower priced stock media.

(b) Atlanta Meetings and Other Evidence of Agreement to Fix Price

In early October, 1984, Hans van der Sande and Robert Baldauf of Washington Mills met with Robert Biebel of BCS in Atlanta to discuss "the PW situation in Columbus," and visited Pratt's Columbus plant. (Pl.Ex. 200). At this point, BCS was no longer selling media to the Columbus plant. During that meeting, however, the fact that BCS was willing to turn the Pratt Columbus account over to Washington Mills for direct sales was discussed. Van der Sande's report of that meeting stated that Biebel said he has "several good friends at P & W," who "take trips on his boat to the Bahamas and give him

an edge over competition." (Pl.Ex. 191). The record indicates that BCS did provide Caribbean trips on its corporate boat for certain Pratt employees, including James Neil, Moe Dahill, and Dave Dawson, all of whom were responsible, to varying degrees, for testing and approving media.[16]

There was also evidence that BCS worked with its contacts at Pratt to develop the Washington Mills media used at the Columbus plant. Although the extent of their collaboration remains disputed, it was undisputed that Washington Mills and BCS coordinated their activities in developing the media for Pratt.[17]

Regarding the October, 1984 trip to the Columbus plant, van der Sande's report stated that "[w]e had a great visit, inside sources confirmed to Bob [Biebel] that the Pratt people were impressed by our visit. We were

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[16] DeLong contends that Washington Mills gave BCS employees, particularly Robert Biebel and William Biebel, free Caribbean vacations. There does not appear to be evidence in the record suggesting that Washington Mills gave trips to BCS people.

[17] DeLong alleges that Lawrence W. Bates, a former Pratt employee, was a key player in the arrangement between BCS and Pratt. Bates worked for Pratt for 37 years, retiring in 1977. Bates then went to work for BCS as a salesman responsible almost exclusively for the Pratt account in Connecticut. Contrary to DeLong's assertions, Bates retired several years before the Washington Mills media was approved by the Columbus plant, and thus he could not have personally issued the PMCs in question. Undoubtedly, his contacts at Pratt were advantageous to BCS, but our review of the record indicates that his role was not as instrumental as Delong suggests. Bates testified that he did not deal with the Columbus plant at all.

given (special permission) to visit the actual manufacturing facilities." (Pl.Ex. 192, van der Sande Dep. 39). The report also stated: "his [Biebel's] friend Jim at the Columbus plant makes sure which media does or does not work." (Pl.Ex. 191).

The foregoing evidence supports DeLong's allegations of joint action between Washington Mills and BCS in regard to media sales to Pratt. The evidence suggests that BCS had contacts at Pratt which could provide an incentive for Washington Mills to coordinate with BCS in its dealings on the Pratt account, and that the two companies did in fact act jointly with respect to the Pratt account.

On the day following the October, 1984 trip to the Columbus plant with BCS officials, van der Sande made a routine sales call on DeLong, who was actually servicing the Pratt account at the time. Van der Sande did not mention his visit the day before to the Columbus plant. In van der Sande's report of that meeting dated October 10, 1984, he stated that DeLong was "not very happy with BCS, and P & W . . . . Harold does not play with a full deck either. . . . He is not all wrong about the B.C.S. situation, long term it may not work. Bob Bieble [sic] feels we are secure for at least 3 years unless Delong [sic] does not play the game." (Pl.Ex. 194).

The evidence that Washington Mills and BCS had worked together in developing the Pratt media; that the Pratt media was priced at a premium though it was in fact identical to generic media; that BCS's contacts at Pratt provided an incentive for joint action; that Washington Mills and BCS were continuing to work together on

the Pratt account during the October, 1984 plant visit, long after DeLong had replaced BCS as the Pratt distributor; and that Washington Mills and BCS were conversing in October, 1984 about the good prospects for continuing the Pratt arrangement unless DeLong refused to "play the game" – all supports DeLong's assertion that Washington Mills and BCS had agreed to "pad" the price of the Pratt media.

(c) "Commissions" from Washington Mills to a BCS Affiliate

DeLong presents additional, and more compelling, evidence of joint action between Washington Mills and BCS. Washington Mills paid Wood & Thompson, a Bahamian corporation which owned most of BCS's stock at the time, funds which were tied to sales of media to Pratt.[18] The payment of these funds, which amounted to approximately $50,000, is not in dispute. The payments were based on 15% of the wholesale selling price of media to Pratt and lasted for approximately two years after BCS ceased servicing the Columbus plant.

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[18] Prior to 1982, William and Robert Biebel owned all of BCS's stock. In 1982, they sold their interest in BCS to Malin, Kilrea & Larne, a Hong Kong corporation. Malin, Kilrea and Wood & Thompson are related corporations. During the time Malin, Kilrea owned BCS, BCS regularly paid "management fees" to Malin, Kilrea, which evidently were used to fund personal annuities for William Biebel and Robert Biebel. The payments from Washington Mills directly to Wood & Thompson served as these fees. BCS also made a $50,000 "loan" to Wood & Thompson which was never repaid.

The defendants claim that this money was compensation for technical work done by BCS and for BCS's work in getting Washington Mills's product approved by Pratt, even though BCS no longer sold media to the Columbus plant. Such an "override" was not customary; in fact the evidence shows that Washington Mills had never paid such a commission to any other distributor. Defendants claim that the Pratt situation was so complex that additional compensation to BCS was justified.

DeLong claims that these "commissions" actually represented BCS's share of the inflated price Pratt paid for media. To support its argument, DeLong points to testimony by James Neil, a supervisor in the engineering group at Pratt who was instrumental in issuing the PMC's for the media at issue in this case. Neil worked closely with BCS in 1981 through 1983, and considered Robert Biebel to be a friend of his. Neil testified that he worked with Robert Biebel on testing of media, and that Biebel was compensated for this testing at the time it was performed. Biebel and BCS were compensated for testing directly, not through later sales of media to Pratt. Robert Biebel testified, however, that BCS was not paid for its 1979-83 testing and development of media for Pratt.

This testimony, along with other evidence in the record, demonstrates that genuine issues of material fact exist as to the precise nature of the payments from Washington Mills to BCS. Defendants call it compensation for their work on "developing" the Pratt account, while DeLong claims that it is merely Washington Mills passing on to BCS the benefits of the inflated price, because BCS was integral in setting up the scheme. A jury reasonably could infer that Washington Mills desired to enter into an

agreement with BCS to exploit BCS's contacts with key Pratt people, and agreed to pay the commissions to BCS's offshore sister corporation, Wood & Thompson. A jury also could conclude that the Wood & Thompson "commissions" demonstrate that Washington Mills and BCS agreed on the "pad" to the price. The amount of the commissions was linked to the sale price of media to Pratt, and there is a reasonable inference that the "commissions" were a means for BCS to share in the "pad" by which the price was inflated.

Viewing the totality of this evidence in the light most favorable to DeLong, which we must, *United States v. Diebold, Inc.*, 369 U.S. 654, 655, 82 S.Ct. 993, 994, 8 L.Ed.2d 176 (1962), a jury reasonably could conclude that Washington Mills and BCS worked together to develop "special" media for sale to Pratt and agreed to sell it at an inflated price. The meeting between BCS and Washington Mills officials in Atlanta and trip to Pratt's Columbus plant, gratuities from BCS to key Pratt people, and the "commissions" paid by Washington Mills based on a percentage of the price of media sold to Pratt all reasonably tend to support DeLong's conspiracy allegation.

2. DeLong's Termination in Furtherance of the Conspiracy[19]

(a) DeLong Confronts Washington Mills

Before DeLong began supplying media to Pratt, the relationship between DeLong and Washington Mills appears to have been good. From the earliest sales of Washington Mills's "special" media to Pratt, however, DeLong was concerned. A DeLong employee stated that no Washington Mills ceramic media had ever been so expensive, and Harold DeLong feared that competing distributors were being quoted a lower price. On multiple occasions throughout 1983, 1984, and 1985, Harold

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[19] In addition to the evidence discussed in the text, DeLong contends that complaints by dealers other than BCS about DeLong's pricing practices led to its termination. After it began selling Washington Mills's products in 1982, DeLong was an aggressive seller and converted many end-users to Washington Mills media. DeLong's aggressive sales practices also engendered complaints from competing Washington Mills distributors. Corrosion Specialties, Inc., Paschal Associates, Inc., and BRW Quality Metal Finishing, Inc. all complained to Washington Mills that DeLong was underbidding them, and BRW suggested that DeLong's distributorship be terminated. Washington Mills did not act immediately on this request, but rather issued an "open letter" to certain distributors detailing problems with inter-distributor selling.

This evidence is not sufficient to show concerted action between Washington Mills and its other distributors to terminate DeLong. The Supreme Court has held that in a distributor termination case, "something more than evidence of complaints [by other distributors] is needed" for a plaintiff to survive a motion for summary judgment. *Monsanto*, 465 U.S. at 764, 104 S.Ct. at 1471. We address that "something more" in the text.

DeLong and his employees directly confronted Washington Mills with their belief that the "special" media was identical to stock media. DeLong was told that the Pratt media was "special" and that it could not purchase it at the stock price listed on Washington Mills's general price list, but DeLong did not believe the Washington Mills personnel.

DeLong pressured Washington Mills to sell it generic media to resell to Pratt. DeLong sought to have Washington Mills apply the PMC number to boxes of stock media and ship it to Pratt at the stock price, but Washington Mills refused to do so. Robert Baldauf, a Washington Mills employee, visited DeLong's Atlanta offices in May 1985 to discuss the Pratt & Whitney pricing situation. This was just a few months before DeLong was terminated. When Harold DeLong and Dan Dickey, the DeLong salesman primarily responsible for the Pratt account, confronted Baldauf with their assertions that the so-called "special" media was in fact Washington Mills's standard 20-bond composition, Baldauf replied that Hans van der Sande handled that situation and that, in any event, the media sold to Pratt contained diamond dust. DeLong suspected that the "special" media was stock media and did not contain diamond dust, but he could not absolutely confirm his suspicions. Baldauf denied telling any DeLong employee that the Pratt media contained diamond dust.

The record is clear that DeLong drew constant attention to what it considered a discrepancy in the price of media sold to Pratt, and that Washington Mills repeatedly insisted that the higher price for the Pratt media was justified. This evidence supports DeLong's assertion that

it was an obstacle to the continuation of the scheme to "pad" the Pratt price, and that it was terminated to remove that obstacle.

(b) Atlanta meetings

Harold DeLong called BCS sometime in 1983, before DeLong received its first Pratt order, and asked William Biebel for information regarding the BCS numbers on the Pratt PMCs. DeLong needed this information because the media was listed on Pratt's PMC as being manufactured by BCS, when in reality it was Washington Mills's media. When DeLong asked Biebel about these numbers, Biebel suggested that the two companies "work out an agreement between ourselves," because of BCS's development work and DeLong's proximity to the Columbus plant. (William Biebel 2d Dep. 113).

Sometime shortly after this discussion, in August 1983, Robert Biebel of BCS flew to Atlanta to meet with Harold DeLong to discuss a "mutual working arrangement" regarding Pratt, where, according to Biebel, BCS would provide technical support to Pratt and DeLong would warehouse the media. (Robert Biebel Dep. 23, William Biebel Dep. 84, 86.)[20] At this meeting, Biebel told DeLong something to the effect of there was "plenty of money" in the Pratt account for both BCS and DeLong.

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[20] DeLong claims, but has adduced no evidence to support its claim, that this meeting was arranged by Peter Ford of Washington Mills. Defendants deny this.

(Robert Biebel Dep. 31, van der Sande Dep. 52). DeLong was not at all interested in working with BCS; Harold DeLong believed he had the necessary expertise and facilities to serve Pratt himself.

In addition to the above indications from BCS, there is also evidence that Washington Mills told DeLong that the Pratt account "belonged" to BCS. (Dickey Dep. 173).

In October, 1984, one day after he visited the Pratt plant with BCS principals, van der Sande met with Harold DeLong on a sales call. It was after that meeting that van der Sande stated that DeLong was "not very happy with BCS, and P & W. . . .Harold does not play with a full deck either. . . .He is not all wrong about the B.C.S. situation, long term it may not work. Bob Bieble [sic] feels we are secure for at least 3 years unless Delong [sic] does not play the game." (Pl.Ex. 194).

This statement by a BCS principal to a Washington Mills employee that BCS is concerned that DeLong might not "play the game" is evidence from which a jury reasonably could find joint action between Washington Mills and BCS regarding the termination of DeLong. Biebel's attempt to enter into an arrangement with DeLong whereby everyone could earn "plenty of money" lends further support to BCS's involvement in DeLong's termination when DeLong refused to participate in the scheme.

(c) Termination of DeLong

Genuine issues of material fact also exist with regard to the reasons for DeLong's termination. DeLong, of course, asserts that it was terminated by Washington

Mills for its refusal to cooperate in the alleged illegal price fixing scheme and for being a price cutter. Washington Mills alleges that it terminated DeLong because it was behind in its payments and abusive to Washington Mills personnel.

Although DeLong does not make this argument explicitly, the thrust of its position is that the reasons Washington Mills gave for its termination of DeLong are a pretext for the actual reasons DeLong was terminated; i.e., DeLong's refusal to participate in the Pratt scheme. While such evidence standing alone would not be sufficient to show joint action in violation of the antitrust laws, "[e]vidence of pretext, if believed by a jury, would disprove the likelihood of independent action on the part of" Washington Mills. *Fragale & Sons Beverage Co. v. Dill*, 760 F.2d 469, 474 (3d Cir.1985). *See. O.S.C. Corp. v. Apple Computer, Inc.*, 792 F.2d 1464, 1469 (9th Cir.1986) (antitrust plaintiff must come forward with specific factual support to overcome defendant's asserted independent business justification). *Cf. H.L. Moore Drug Exchange v. Eli Lilly & Co.*, 662 F.2d 935, 941 (2d Cir.1981) (mere fact that a business reason advanced by a defendant for its cutoff of a customer is undermined does not, by itself, justify the inference that the conduct was therefore the result of a conspiracy), *cert. denied*, 459 U.S. 880, 103 S.Ct. 176, 74 L.Ed.2d 144 (1982); *Malcolm v. Marathon Oil Co.*, 642 F.2d 845, 860 (5th Cir. Unit B) (poor credit may constitute a defendant's proof that a refusal to deal was a unilateral

rather than conspiratorial action), *cert. denied,* 454 U.S. 1125, 102 S.Ct. 975, 71 L.Ed.2d 113 (1981).[21]

A jury is entitled to determine whether Washington Mills's explanation of DeLong's termination is credible, because the facts surrounding the allegedly "abusive" behavior of DeLong employees is disputed. Dan Dickey, a DeLong salesman who allegedly was abusive toward Washington Mills personnel, testified that he was not abusive, and Harold DeLong stated that he was "shocked" to hear of allegations of abusive behavior by his employees to Washington Mills personnel. (DeLong Dep. 78-79). Washington Mills personnel, on the other hand, testified that Dan Dickey, Betty Day, DeLong's purchasing agent, and other DeLong employees were abusive to Washington Mills personnel, calling them names and using excessive profanity. Van der Sande testified that the Pratt situation "could have contributed to DeLong's termination, but that he did not think that was the reason. (van der Sande Dep. 94). John Williams testified that he did not consider the Pratt situation when he decided to terminate DeLong, but he did have the complaints of competing distributors in mind when he terminated DeLong.

Washington Mills's other stated reason for terminating DeLong, delinquent payments, is also in dispute. Robert Baldauf testified that he recommended DeLong be terminated for abusive behavior, but that he did not

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[21] This former Fifth Circuit case was decided after the close of business on September 30, 1981, and is binding precedent under *Stein v. Reynolds Securities, Inc.*, 667 F.2d 33, 34 (11th Cir.1982).

check DeLong's payment history, nor did Hans van der Sande. DeLong admits that its payment times increased as its pricing disputes with Washington Mills increased, and that DeLong was "trying to get their attention a little bit." (DeLong Dep. 90). DeLong's payment history, however, was no worse than several other Washington Mills distributors.

Termination of distributors by Washington Mills was extremely rare. Hans van der Sande testified that in his thirteen years at Washington Mills, to his knowledge only two other distributors had been terminated, one which did not buy from Washington Mills for over a year and another which did not pay its bills for eight months.

We believe that DeLong has adduced evidence which tends to exclude the possibility that Washington Mills was acting independently when it terminated DeLong. There are genuine issues of fact regarding the reasons for the termination. A reasonable jury could find that Washington Mills and BCS worked together to develop the "special" media for Pratt utilizing the contacts which BCS had cultivated at Pratt; that Washington Mills and Pratt agreed to add an artificial "pad" to the price; that both Washington Mills and BCS believed that the Pratt account belonged to BCS; that both Washington Mills and BCS attempted to get DeLong to go along with the scheme to inflate the price and share the profit, but that DeLong refused to "play the game," that DeLong was a constant irritant and posed a risk to the scheme to "pad" the price; and finally, a reasonable jury could find that there was joint action between Washington Mills and BCS in the decision to terminate DeLong in order to remove the risk which it posed to the scheme.

3. Defendants' Arguments

Defendants argue that Washington Mills unilaterally established its own wholesale prices and never agreed with any distributors as to the retail price to be charged by the distributor. While there is ample evidence to this effect in favor of Washington Mills, we cannot ignore the strong circumstantial evidence summarized above that Washington Mills and BCS did conspire to inflate the price of media destined for Pratt, thus agreeing that a fixed "pad" would be added to the wholesale price charged by Washington Mills and the retail price charged by BCS. Thus, there are genuine issues of fact.

Defendants also assert that the fact that Washington Mill's personnel testified that no one discussed the termination of DeLong with anyone at BCS until after DeLong was terminated is evidence of no joint action. This argument is unpersuasive for the same reason we just stated in rejecting defendant's argument that there was no evidence of any agreement with any other distributor regarding the price of Washington Mills products. Conspiracies are rarely evidenced by explicit agreements, and must almost always be proven by inferences that may fairly be drawn from the behavior of the alleged conspirators. *H.L. Moore Drug Exchange v. Eli Lilly & Co.*, 662 F.2d 935, 941 (2d Cir.1981) (citation omitted), *cert. denied*, 459 U.S. 880, 103 S.Ct. 176, 74 L.Ed.2d 144 (1982). Circumstantial evidence can establish the existence of a conspiracy in antitrust litigation. *Pan-Islamic Trade Corp. v. Exxon Corp.*, 632 F.2d 539, 558 (5th Cir.1980), *cert. denied*, 454 U.S. 927, 102 S.Ct. 427, 70 L.Ed.2d 236 (1981). At a minimum, though, "the circumstances [must be] such as to warrant a

jury in finding that the conspirators had a unity of purpose of a common design and understanding, or a meeting of minds in an unlawful agreement." *American Tobacco Co. v. United States*, 328 U.S. 781, 810, 66 S.Ct. 1125, 1139, 90 L.Ed. 1575 (1946).

This court must look beyond the defendants' bald denial of concerted action and analyze the substance of DeLong's evidence in order to determine whether summary judgment was appropriate. "When faced with defendants' sworn denial of the existence of a conspiracy, it is incumbent upon the plaintiff to produce significant probative evidence demonstrating that a genuine issue of fact exists as to this element of the complaint." *Pan-Islamic*, 632 F.2d at 554.

C. *Conclusion*

The record contains evidence from which a reasonable jury could conclude that Washington Mills and BCS conspired to fix an inflated price for media sold to Pratt, that DeLong was not "playing the game," that therefore DeLong posed a threat to uncover the scheme, and that DeLong was terminated because of its refusal to play the game. This evidence constitutes "positive evidence which tends to exclude the possibility of unilateral action." *Helicopter*, 818 F.2d at 1534.

The record in this case is filled with disputed issues of material fact regarding a vertical price conspiracy between Washington Mills and BCS and DeLong's alleged termination pursuant to that conspiracy. Therefore, summary judgment on DeLong's section 1 claim was improper.

III. ROBINSON-PATMAN ACT CLAIMS

DeLong's complaint alleged that Washington Mills engaged in unlawful price discrimination in violation of section 2 of the Clayton Act, as amended by section 1 of the Robinson-Patman Act.[22] DeLong contends that

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[22] Section 2 of the Clayton Act, as amended by section 1 of the Robinson-Patman Act, provides in relevant part that:

> It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided*, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered. . . .

15 U.S.C. §13(a). As this court recently has reiterated, "the basic purpose of Section 2(a) of the Robinson-Patman Act is to insure that purchasers from a single seller would not be injured by the seller's discriminatory pricing policies. The complaining party must allege and prove that there were two

(Continued on following page)

Washington Mills discriminated in price by selling media of like grade or quality to others at prices lower than those offered to DeLong.[23]

The district court denied the defendants' motion for summary judgment in part and granted it in part. The court concluded that the alleged more favorable payment periods and greater discounts given to BCS by Washington Mills and the "commissions" paid by Washington Mills to BCS's offshore affiliate, Wood & Thompson,

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(Continued from previous page)

sales made by the same seller to at least two different purchasers at different prices." *Pierce v. Commercial Warehouse, Div. of Thompson Automotive Warehouse, Inc.*, 876 F.2d 86, 87 (11th Cir.1989). A Robinson-Patman plaintiff must also demonstrate some sort of competitive injury. *Chrysler Credit Corp. v. J. Truett Payne Co.*, 670 F.2d 575, 581-82 (5th Cir.1982); *M.C. Manufacturing Co. v. Texas Foundries, Inc.*, 517 F.2d 1059, 1065-66 (5th Cir.1975).

[23] In the district court, DeLong also argued that Washington Mills's infrequent sales to Pratt during the times material to this action were at lower prices than those charged to DeLong for media which DeLong resold to Pratt, an allegation of "primary line" price discrimination under the Robinson-Patman Act. The district court held that DeLong had not presented sufficient evidence of market conditions showing competitive injury, nor did DeLong show the requisite predatory intent on the part of Washington Mills. Therefore, it granted summary judgment against DeLong on those aspects of its Robinson-Patman Act claim based on Washington Mills direct sales to end-users. District Court Order 19-20, 24. DeLong does not contest this district court ruling on appeal, so we do not address those aspects of DeLong's Robinson-Patman claim. The Robinson-Patman Act claim DeLong raises before us is addressed in the text.

could constitute price discrimination, and thus denied summary judgment on those aspects of DeLong's Robinson-Patman claims. District Court Order 21, 24. Neither party contests that ruling on appeal. The court granted defendants' motion for summary judgment on DeLong's claim that the different prices for "stock" and "special" media constituted price discrimination under the Robinson-Patman Act. DeLong appeals this aspect of the district court's decision.[24]

The district court partially granted defendants' motion for summary judgment based on the judicially created "availability defense" as stated in *Shreve Equipment, Inc. v. Clay Equipment Corp.*, 650 F.2d 101, 105 (6th Cir.), *cert. denied*, 454 U.S. 897, 102 S.Ct. 397, 70 L.Ed.2d 213 (1981).[25] *See Hasbrouck v. Texaco, Inc.*, 842 F.2d 1034, 1038 (9th Cir.1987), *cert. granted*, ___ U.S. ___, 109 S.Ct. 3154, 104 L.Ed.2d 1018 (1989); *Boise Cascade Corp. v. FTC*, 837 F.2d 1127, 1130 (D.C.Cir.1988); *FLM Collision Parts, Inc. v. Ford Motor Co.*, 543 F.2d 1019, 1025-26 (2d Cir.1976), *cert. denied*, 429 U.S. 1097, 97 S.Ct. 1116, 51 L.Ed.2d 545 (1977).

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[24] Defendants' brief also argues that DeLong has not demonstrated sufficient competitive injury under the Robinson-Patman Act with regard to the "special" versus stock aspect of its claims as well as on other aspects of its claims upon which the district court denied summary judgment. The district court did not reach the competitive injury question. Therefore, defendants' arguments on this point, and plaintiff's in reply, are more properly addressed to the district court in the first instance.

[25] For purposes of this appeal, we assume but expressly do not decide whether this circuit recognizes the availability defense.

The availability defense is stated when, although the seller offered different prices for the same commodity to different buyers, the lower price was available to all buyers. "Where a purchaser does not take advantage of a lower price or discount which is functionally available on an equal basis, it has been held that either no price discrimination has occurred, or the discrimination is not the proximate cause of the injury." *Shreve*, 650 F.2d at 105. The district court held that the price difference between special and stock media were subject to the availability defense even though Pratt would only buy "special" media marked with its PMC numbers. The court emphasized that the fact that Pratt would not accept anything but special media did not affect the availability of stock media to DeLong from Washington Mills. We believe that the district court misapplied the availability defense to the unique facts of this case.

We find *Shreve* to be distinguishable. In that case, the principal owner of Shreve was both a dealer and a territorial manager for a farm equipment manufacturer. Because he was a territorial manager, the manufacturer did not pay him the volume-based discount on sales of farm equipment that other dealers received. The court rejected Shreve's Robinson-Patman Act claim on the ground that had its owner not chosen to be a territorial manager and obtained the benefits of that position, Shreve would have received the volume discounts.

The requirement of *Shreve* that the lower price be "functionally available" negates the availability defense in this case. In this case, unlike *Shreve*, DeLong did not voluntarily forego its ability to purchase special media at the stock price; Washington Mills would not sell the

media to DeLong at that price for resale to Pratt. DeLong contends that it did not have functional access to the stock price for media, because Washington Mills continually represented that the media going to Pratt were "special" and were not available for sale to Pratt via DeLong at the stock price. Because Washington Mills did not offer stock prices on the media labeled "special," the stock price was not functionally available within the meaning of *Shreve*.

The defendants contend that regardless of the difference in price between stock and special media, the stock media was available for purchase by DeLong at all times. Defendants insist that DeLong could have obtained media at stock prices for resale to Pratt if DeLong itself had only agreed to put Pratt's PMC numbers on the boxes of media. This is flatly inconsistent with defendants' assertions throughout its dealings with DeLong that special media were somehow different from stock media, and that the difference justified the higher price for media sold to Pratt. Stock media was available for purchase by DeLong, but such media could not be resold to Pratt.

Ultimately, resolution of this issue depends on whether special media and stock media are the same, i.e., are goods "of like grade and quality" within the meaning of the Robinson-Patman Act. If products are physically identical, despite differences in labeling or branding, then they are "of like grade and quality" for the purpose of stating a prima facie Robinson-Patman Act case, even though consumers may prefer a higher priced "premium" product. *FTC v. Borden Co.*, 383 U.S. 637, 643-44, 86 S.Ct. 1092, 1097, 16 L.Ed.2d 153 (1966); *see First Comics Inc. v.*

World Color Press, 672 F.Supp. 1068, 1071 (N.D. Ill.1987). As we discussed in Part II *supra*, DeLong has presented substantial evidence tending to show that "special" media is identical to Washington Mills's stock product. If the products are in fact identical, and Washington Mills charged different prices to DeLong and others for them, then summary judgment on this aspect of DeLong's Robinson-Patman Act claim was improper. We therefore reverse the district court on this issue.

IV. PENDENT STATE LAW CLAIMS

DeLong appended Georgia law breach of contract, tortious interference with business relations, and fraud claims to its complaint that the defendants violated the federal antitrust laws. The district court granted summary judgment in favor of defendants on all state law claims. We agree with the district court that summary judgment was appropriate as to the contract and tortious interference claims, but reverse as to one aspect of the fraud claim.

A. *Breach of contract*

DeLong contends that the district court erred in granting summary judgment for defendants on its breach of contract claim. The district court rejected DeLong's claim under Georgia law for breach of an oral distributorship contract with Washington Mills, stating that "distributorship agreements which are not in writing are terminable at will for any cause." We, like the district court, find *West Virginia Glass Specialty Co. v. Guice & Walshe, Inc.*, 170 Ga.App. 556, 317 S.E.2d 592, 594 (1984),

to be on point. In *West Virginia Glass*, the court held that where there was no written agreement between a distributor and a manufacturer and no definite time period for the distributorship, the arrangement was terminable at will by either party without contractual liability.

DeLong correctly observes that oral contracts can be enforceable. In order for any contract to be enforced, however, it must contain definite terms. *Vitner v. Funk*, 182 Ga.App. 39, 354 S.E.2d 666 (1987); *Parks v. Atlanta News Agency, Inc.*, 115 Ga.App. 842, 156 S.E.2d 137 (1967). DeLong can point to no definite duration of the distributorship nor to any exclusive rights conferred under it, so we must reject its argument. We find no error in the district court's holding that no definite contract existed between DeLong and Washington Mills.

DeLong also argues promissory estoppel based on O.C.G.A. § 13-3-44(a), which provides that "[a] promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise." DeLong's promissory estoppel argument fails for the same reason as its contract claim – it can point to no definite promise by Washington Mills regarding the terms and duration of its distributorship. *Lou's Office Supplies, Inc. v. Steelcase, Inc.*, 174 Ga.App. 701, 331 S.E.2d 75, 76 (1985), squarely rejects the same argument in a similar distributor termination situation. We find *Lou's* controlling on this issue. Summary judgment on DeLong's contract claims was properly granted.

B. *Tortious interference with business relations*

DeLong challenges the district court's grant of summary judgment on its tortious interference claim. A claim based on tortious interference with business relations does not require evidence of a binding contract. *Integrated Micro Systems, Inc. v. NEC Home Electronics (USA), Inc.*, 174 Ga.App. 197, 329 S.E.2d 554, 557-58 (1985). Interference with the plaintiff's relationships with its customers, suppliers, or representatives may be actionable even though such relationships may be terminable at will. *U.S. Anchor Manufacturing, Inc. v. Rule Industries, Inc.*, 717 F.Supp. 1565, 1577 (N.D.Ga.1989), *citing E.D. Lacey Mills, Inc. v. Keith*, 183 Ga.App. 357, 359 S.E.2d 148, 155 (1987).

The party charged with tortious interference must have "(1) acted improperly and without privilege, (2) purposely and with malice with the intent to injure, (3) induced a third party or parties not to enter into or continue a business relationship with the plaintiff, and (4) for which the plaintiff suffered some financial injury." *Id.*, *quoting Hayes v. Irwin*, 541 F.Supp. 397, 429 (N.D.Ga.1982), *aff'd mem.*, 729 F.2d 1466 (11th Cir.), *cert. denied*, 469 U.S. 857, 105 S.Ct. 185, 83 L.Ed.2d 119 (1984). Interference with business relationships will be excused if it is privileged. *Orkin Exterminating Co. v. Martin Co.*, 240 Ga. 662, 242 S.E.2d 135 (1978). "[I]n order for [the defendant] to come under the protection of the competition privilege, it must establish inter alia that it did not employ improper means." *Integrated Micro Systems*, 174 Ga.App. at 202, 329 S.E.2d at 559. The privilege defense is not available where interference is achieved through actions taken in violation of a confidential relationship. *Hayes*, 541 F.Supp. at

430, *E.D. Lacey Mills*, 183 Ga.App. at 364, 359 S.E.2d at 156.

It is undisputed that after Washington Mills terminated DeLong's distributorship, Washington Mills provided other distributors with DeLong's customer list and encouraged those distributors to solicit those customers' business.[26]

DeLong alleges that it turned over its customer list to Washington Mills in confidence, for the sole purpose of facilitating "drop shipment" of media directly to end-users. Washington Mills argues that it received the names of DeLong's customers in the ordinary course of business and that there is no evidence of any agreement that the list would be kept confidential after termination, and that its conduct following DeLong's termination therefore was privileged. We agree. Customer lists are "not within the purview of traditional Georgia law as to property and [are] not protectable from post-employment disclosure and use in the absence of contract." *Durham v. Stand-By Labor of Georgia, Inc.*, 230 Ga. 558, 198 S.E.2d 145, 149 (1973). *See Textile Rubber & Chemical Co. v. Shook*, 243 Ga. 587, 255 S.E.2d 705, 709 (1979). The record indicates no evidence of any agreement that DeLong's customer list would be kept confidential upon termination.

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[26] DeLong's tortious interference claim has another aspect, namely that the very act of termination by Washington Mills constituted tortious interference because DeLong could no longer provide its customers with Washington Mills media. Because Washington Mills was free to terminate DeLong, *see supra*, any negative effect on DeLong's business resulting from that termination cannot constitute tortious interference. *West Virginia Glass*, 317 S.E.2d at 594.

DeLong's reliance on *Robert B. Vance & Associates, Inc. v. Baronet Corp.*, 487 F.Supp. 790 (N.D.Ga.1979), is misplaced. In *Vance*, the customer lists at issue were treated as trade secrets, which was not the case here. 487 F.Supp. at 799. Furthermore, the competition between sellers in *Vance* occurred prior to the termination of the distributorship agreement, as opposed to this case, where the competition occurred after the distributorship was legally terminated. DeLong has presented no evidence to suggest that these contacts occurred before it was terminated nor that its business was disparaged.

The district court pointed out that the end-users of media are appropriately characterized as Washington Mills's customers as well as DeLong's customers, since the end-users are employing Washington Mills products. Washington Mills therefore has a right to solicit those customers. It is not a tort to solicit the trade of another's customers. *Parks v. Atlanta News Agency, Inc.*, 115 Ga.App. 842, 156 S.E.2d 137, 140 (1967).

We therefore reject DeLong's tortious interference claim and affirm the district court on this issue.

C. *Fraud*

DeLong alleged several instances of fraud. There are five elements to a claim of fraud under Georgia law: (1) a false representation of a past or present fact; (2) scienter; (3) intention to induce the plaintiff to commit an act or refrain from committing an act; (4) reliance; and (5) damage. O.C.G.A. § 51-6-1; *Parsells v. Orkin Exterminating Co.*, 172 Ga.App. 74, 322 S.E.2d 91 (1984). The district court granted summary judgment in favor of defendants. We

believe that the district court improperly granted summary judgment on one aspect of DeLong's fraud claim.

DeLong alleged that Washington Mills's deceptive labeling of special media constituted fraud. The court found no justifiable reliance, because DeLong was aware of the falsity of the representation, citing *Blanchard v. West,* 115 Ga.App. 814, 156 S.E.2d 164, 166 (1967); *Gaultney v. Windham,* 99 Ga.App. 800, 109 S.E.2d 914 (1959). Those cases stand for the proposition that a fraud plaintiff must have used due diligence in attempting to establish the truth or falsity of a defendant's assertions. Where the plaintiff repeatedly confronts the defendant with the apparent falsity of its representations, and the defendant repeatedly confirms its original statement, asserting special knowledge, reliance is justified. *Georgia-Carolina Brick & Tile Co. v. Brown,* 153 Ga.App. 747, 266 S.E.2d 531, 539 (1980).

The due diligence requirement "does not go so far as to require the exhaustion of all available means to ascertain the truth of the representations," but demands only reasonable care, which is a jury question. *Gibson v. Home Folks Mobile Home Plaza, Inc.,* 533 F.Supp. 1211, 1216 (S.D.Ga.1982). As discussed above, we believe that DeLong has demonstrated a genuine issue of fact as to whether special media was in fact identical to stock media. Washington Mills's repeated assertions to the contrary raise a jury question as to fraud. We therefore reverse the district court's grant of summary judgment on this aspect of DeLong's fraud claims.

DeLong raised other fraud claims, which the district court rejected because the alleged frauds referred only to

future events and therefore are not actionable. *Lanham v. Mr. B's Oil Co.*, 166 Ga.App. 372, 304 S.E.2d 738, 739 (1983). DeLong argues that Washington Mills's conduct falls within the exception for promises regarding future events made with the present intention not to perform, but points to no specific evidence to support this claim of Washington Mills's present intention. DeLong's arguments on appeal concerning these other fraud claims thus are without merit, and the district court appropriately granted summary judgment on those claims.

V. CONCLUSION

In summary, we hold that summary judgment was improperly granted on DeLong's allegation of a vertical price conspiracy by the defendants in violation of section 1 of the Sherman Act. We further hold that summary judgment was improper on the Robinson-Patman Act claim raised by DeLong on appeal. With regard to the state law issues, we affirm the decision of the district court granting summary judgment on DeLong's contract and tortious interference with business relations claims, but reverse as to the fraud claim which centers on Washington Mills's representations concerning special and stock media.

AFFIRMED in part, REVERSED in part, and REMANDED.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

DE LONG EQUIPMENT COMPANY

v.

WASHINGTON MILLS ABRASIVE COMPANY; WASHINGTON MILLS CERAMIC CORPORATION; B.C.S. COMPANY, INC.; HANS VAN DER SANDE; JOHN WILLIAMS; PETER WILLIAMS; ROBERT BALDAUF and ROBERT BIEBEL

CIVIL ACTION NO. 1:86-cv-275-GET

FINAL JUDGMENT PURSUANT TO RULE 54(b)

An Order having been signed by Judge G. Ernest Tidwell on June 16, 1988 and filed in the Clerk's Office on June 17, 1988, granting in part and denying in part the motion for summary judgment of defendants Washington Mills Abrasive Company, Washington Mills Ceramic Corporation, Hans van der Sande, John Williams, Peter Williams and Robert Baldauf and an order having been signed by Judge G. Ernest Tidwell on July 28, 1988 and filed in the Clerk's Office on July 29, 1988, granting plaintiff's motion for certification of final judgment under Rule 54(b), it is

ADJUDGED that plaintiff take nothing and that the action is dismissed as to all plaintiff's claims except under section 2(a) of the Robinson-Patman Act insofar as those claims based on alleged rebates, favorable payment

terms and/or higher distributor discounts granted B.C.S. Company by defendant Washington Mills.

FURTHER ORDERED & ADJUDGED that the defendants WASHINGTON MILLS ABRASIVE COMPANY, WASHINGTON MILLS CERAMIC CORPORATION, HANS VAN DER SANDE, JOHN WILLIAMS, PETER WILLIAMS and ROBERT BALDAUF recover of the plaintiff DE LONG EQUIPMENT COMPANY their costs of the action.

LUTHER D. THOMAS, CLERK
U.S. DISTRICT COURT
BY: /s/ Judith G. Hufford
DEPUTY CLERK

FILED & ENTERED IN CLERK'S OFFICE
AUGUST 11, 1988
LUTHER D. THOMAS, CLERK
BY: /s/ Judith G. Hufford
DEPUTY CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

DE LONG EQUIPMENT COMPANY) V.)) WASHINGTON MILLS ABRASIVE) COMPANY; WASHINGTON MILLS) CERAMIC CORPORATION; B.C.S.) COMPANY, INC.; HANS VAN DER) SANDE; JOHN WILLIAMS; PETER) WILLIAMS; ROBERT BALDAUF) and ROBERT BIEBEL)	CASE NO. 1:86-cv-275-GET (Filed June 17, 1988)

ORDER

The above-styled matter is presently before the court on defendants Washington Mills Abrasive Company ("Washington Mills"), Washington Mills Ceramic Corporation ("Ceramic"), Hans van der Sande, John Williams, Peter Williams and Robert Baldauf's motion for summary judgment. Fed. R. Civ. P. 56(b).

This is an action for treble damages and injunctive relief for alleged antitrust violations under sections 1 and 2 of the Sherman Act, section 3 of the Clayton Act and section 2(a) of the Robinson-Patman Act. Plaintiff also alleges breach of contract, tortious interference with business relations and fraud as pendent state law claims. Defendants seek summary judgment on all of plaintiff's theories for relief.

There is a long standing and continuing discovery dispute between plaintiff and the non-movant defendants that remains at this time unresolved. At a status conference on June 10, 1988 plaintiff's counsel represented to

the court that it was not necessary to delay ruling on the above motions until the pending discovery disputes are resolved and plaintiff's counsel informed the court that the plaintiff desired a ruling on the pending motions without any further delay.

I. *FACTS*

In 1979, defendant Washington Mills began selling pre-formed tumbling media, manufactured by its wholly-owned subsidiary Ceramic. Media are elements utilized by manufacturers of mechanical assemblies to grind or polish those assemblies by tumbling the media around the metal parts in a chamber. The result of this process is a more aerodynamically finished machine assembly. Media are composed of various materials – the most common being plastics or ceramics. Ceramic media is coarser than plastic media and cuts or polishes bulk metal more efficiently than does plastic media. Washington Mills almost exclusively sells ceramic media. Customer uses dictate not only different material compositions of media but also the varying shapes and sizes of the media. There are many such shapes and sizes – *i.e.*, triangular, tetrahedral and star-shaped.

Washington Mills sells its media mainly through a network of distributor/wholesalers, although it does sell some media directly to end-user customers. It is undisputed that such direct sales are outside Washington Mills' usual course of business and occur only infrequently.

As a general rule, Washington Mills does not have written distributorship agreements with its distributors. The agreement between Washington Mills and plaintiff

was oral and is evidenced by several memoranda and sales orders. The existence of the agreement is not at issue. The terms of the standard agreement between Washington Mills and its distributors allow the distributor to purchase quantities of media for resale at a set wholesaler discount – usually twenty-five percent (25%) off the Washington Mills list price for the media. There is no provision in the distributorship agreements expressly establishing distributor territories or franchises. Thus, although Washington Mills does supply its distributors with price lists which do, to a degree, serve as a guide for resale prices charged to end-users by distributors, Washington Mills distributors often compete with one another for customer accounts. Since there are few service elements differentiating one distributor from another in the eye of the end-user, distributor competition is based almost solely on price. There are no allegations in the instant matter that Washington Mills ever sought to establish its list price as uniform among its distributors. However, there is evidence that Washington Mills does rely on its distributors to supply it with information concerning customer specifications and needs in order to better gauge the quality of its service to its clientele. Washington Mills, in turn, may utilize some of this information in developing new products and pricing those products.

Defendants John and Peter Williams are officers of Washington Mills. Defendant van der Sande was, at times material herein, Washington Mills' regional sales manager for the southeast. The southeast sales region comprises the states of Florida, Georgia, Alabama, Mississippi, Tennessee, North Carolina, South Carolina

and eastern Arkansas. Defendant Baldauf was regional sales representative for Washington Mills in the southeast. Baldauf's duties were to visit distributors in the field and ascertain their product needs and to communicate that information to van der Sande at Washington Mills' home office in North Grafton, Massachusetts. Van der Sande was responsible for processing orders and arranging for shipments to distributors. He also dealt with distributor complaints or disputes.

Defendant BCS has been a distributor of Washington Mills media since the early 1980s. BCS served as Washington Mills' primary distributor in the Northeast but has never been Washington Mills' sole distributor in any one state. One of Washington Mills' largest end-user customers was and is the Pratt and Whitney Aircraft Division of United Technologies Corporation ("P & W"). Prior to 1982, BCS was Washington Mills' distributor selling to P & W plans in Connecticut and Florida. In 1983, P & W opened a plant in Columbus, Georgia. Because of lucrative past business with other P & W plants and the longstanding good-will established in prior dealings with P & W, Washington Mills desired to service the Columbus plant. To this end, Washington Mills at first supplied media to P & W through BCS.

In September 1982, Washington Mills approved plaintiff as a distributor. Since the P & W account was so profitable, plaintiff was naturally attracted by the prospect of servicing the Columbus plant as a Washington Mills distributor. For a time, BCS ceased servicing the Columbus plant. Defendants allege that BCS did so simply because it determined that servicing the plant increased BCS's service area beyond the company's

capacity to service accounts. Plaintiff avers that BCS "dropped" the Columbus account because DeLong underbid it and won the account. It is uncontested that plaintiff was an aggressive seller of Washington Mills media and had converted many end-using customers to Washington Mills' product. This competitiveness also resulted in plaintiff underbidding several other Washington Mills distributors in the Georgia, Alabama and North Carolina areas – most notably Corrosion Specialties, Inc. ("Corrosion"), Paschal Associates, Inc. ("Paschal") and BRW Quality Metal Finishing, Inc. ("BRW"). Corrosion, Paschal and BRW all complained to Washington Mills about the underbidding and BRW went so far as to suggest that plaintiff be terminated. (Ex. 88 – Plaintiff). Washington Mills refused this request by BRW but issued an "open letter" to all distributors explaining certain "problems" with inter-distributor underselling – *i.e.*, that by underselling, distributors would cause prices to descend into low profit margins thereby affecting customer service (because of a need to cut costs to retain low margin profits) and, consequently, opening the door to heightened competition at the manufacturing level by Washington Mills' competitors.

Beyond this, however, plaintiff claims that Washington Mills denied DeLong the opportunity to pursue the P & W account by insisting that the P & W account belonged to BCS and was "off limits" to plaintiff. Plaintiff also alleges that Washington Mills imposed similar restrictions on plaintiff competing for the Torrington Division Plants of Ingersoll-Rand in North Carolina because the account allegedly "belonged" to Paschal. As to the alleged limitation put on the P & W account,

plaintiff contends that Washington Mills acted in concert with BCS in its decision to restrict plaintiff. Plaintiff contends that its refusal to comply with these restrictions resulted in its termination as a Washington Mills distributor on August 13, 1985. Washington Mills alleges, however, that it terminated plaintiff as a distributor because plaintiff's employees were abusive to Washington Mills personnel and because plaintiff was in arrears on payments to Washington Mills.

The allegations involving customer restrictions are not, however, the sole reasons given by plaintiff for its termination. Plaintiff also alleges that BCS and Washington Mills conspired and combined to fix ceramic media prices and that plaintiff's refusal to become part of the scheme was a material factor in Washington Mills' decision to terminate plaintiff. The price fixing allegations center around the pricing of certain types of media, designated "special" media and manufactured only for P & W. This "special" media is different from "generic" media – that is, media normally manufactured by Washington Mills for wide-spread use – in that it is, allegedly, manufactured to precise customer specifications under heightened quality control. "Special" media is sold at a higher price than genetic media. Defendants claim that the higher price is cost-justified by the greater degree of quality control. Plaintiff avers that the "special" media were actually merely generic media and that their sale at an increased price elevated the price of generic media sold to P & W by illegal means. In support of this contention, plaintiff points out that the "special" and generic media in question do not differ in composition or

shape. Therefore, plaintiff claims, there is no cost justification for the elevated price.

Plaintiff also alleges that Washington Mills gave certain employees of BCS, particularly defendant Robert Biebel and his father, William Biebel, free Caribbean vacations and paid "commissions" to an off-shore corporation, Wood & Thompson, Ltd. ("W & T"), in order to ensure compliance with the pricing scheme. W & T owns a significant amount of stock in BCS. Defendants do not contest the payment of commissions but claim that they were paid as compensation for BCS's development of the BCS business, even though BCS no longer sold media to the Columbus plant. In this connection, the record indicates the BCS's representative defendant Robert Biebel knew two individuals at P & W in Columbus, Jim Neal and Bud Henry, who facilitated the approval of use of Washington Mills media. (Dep. R. Biebel 36). Seizing upon this connection, plaintiff claims that these very same individuals made certain that the elevated P & W Special prices withstood company scrutiny.

Further, plaintiff makes other allegations involving post-termination actions by Washington Mills. Plaintiff contends that Washington Mills used customer information gained from DeLong customer lists to attempt to dissuade DeLong customers from dealing with DeLong. Such lists were available to Washington Mills because all shipments of media from the manufacturing site in Lake Wales, Florida were "drop shipped" to Georgia customers. This shipping procedure required Washington Mills to have a list of all DeLong customers and their addresses. DeLong provided Washington Mills such a list. Washington Mills does not deny that it circulated the list

to competing distributors after plaintiff's termination, but states that this was merely good business practice since soliciting plaintiff's customers is not proscribed by law.

II. *SUMMARY JUDGMENT*

A. *Sherman Act – Section 1*

Section 1 of the Sherman Act prohibits: "[e]very contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several States. . . ." 15 U.S.C. § 1. Plaintiff alleges that defendants have acted in concert in terminating it as a distributor and thereby fixed the price of media.

"Price fixing" is a term utilized to denote anti-competitive joint conduct which results in price stabilization, normally at artificially higher levels which would not be present in a competitive market. Since price fixing is inimical to the very concept of market competition, it is *per se* illegal. *BMI v. Columbia Broadcasting, Inc.*, 441 U.S. 1, 99 S. Ct. 1551 (1979); *United States v. Trenton Potteries*, 273 U.S. 392, 47 S. Ct. 377 (1927). "Naked" vertical price fixing – where actors at different levels of production blatantly agree to fix a price – is rare and is not the only pricing behavior subject to the *per se* rule. Less obvious price restraints, sometimes in the guise of non-price behavior, are also prohibited. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 60 S. Ct. 811 (1940); *see also* R. Bork, The Antitrust Paradox 282-285 (1978). However, if the anticompetitive behavior cannot properly be construed a "price fixing" the determination of whether that behavior violated section 1 of the Sherman Act proceeds by a rule of reason analysis.

A rule of reason analysis permits the defendant to justify seemingly anti-competitive acts by interposing one or more of several defenses. *Appalachian Coals, Inc. v. United States*, 288 U.S. 344, 53 S. Ct. 471 (1933). Generally, these defenses involved claims of economic necessity for the behavior *See* L.A. Sullivan, Antitrust § 69, at 189-92 (1977). Also, since activities analyzed under the rule of reason approach are by definition not *per se* illegal, plaintiff bears the burden of establishing that the activity had an actual anti-competitive effect in the relevant geographic and product markets. *Standard Oil Co. v. United States*, 337 U.S. 293, 69 S. Ct. 1051 (1949).

Thus, in any section 1 case, a court must engage in a four-part inquiry. First, the court must determine whether there has been joint action on the part of the defendants. Second, the court must characterize the alleged restraint as horizontal or vertical and/or price or non-price in nature. Third, the court must decide whether to apply a *per se* rule of illegality or a rule of reason. Last, if a rule of reason analysis is proper, the court must determine whether the alleged restraint is reasonable or unreasonable under the Act.

For the purposes of the motion for summary judgment, the court will assume that plaintiff has presented sufficient evidence of joint action. *United States v. Colgate & Co.*, 250 U.S. 300, 39 S. Ct. 465 (1919).

There is no dispute that the alleged restraint, if any, is a vertical restraint. However, the parties differ on whether the restraint is a price or non-price restraint and, consequently, whether a *per se* rule of illegality or a rule of reason analysis is appropriate.

The court finds that the conduct complained of is best characterized as a non-price restraint and, therefore, that a rule of reason analysis is applicable in this case. The gravamen of plaintiff's section 1 claim is that the complained of pre-termination acts by defendants caused it to be terminated by concerted actions of those defendants thereby eliminating a competitive actor (DeLong) from the ranks of media distributors. This elimination, plaintiff argues, results in upward stabilization in price due to the absence of a price-competitive distributor. Thus, although the complained of activities may have an *indirect* effect of price stabilization, there is no indication of direct effect on price necessary to a claim of price fixing which would be subject to the *per se* rule. In *Monsanto v. Spray-Rite Service Corp.*, 465 U.S. 752, 104 S. Ct. 1464 (1984), the court found that distributor termination cases such as the one at bar are subject to a rule of reason if the concerted action allegedly taken by defendants was a non-price restraint unrelated to a price conspiracy. *Id.* at 1468-69 & n.6; *see also Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 97 S. Ct. 2549 (1977). Here, there is no evidence of an agreement between BCS and Washington Mills to *directly* fix the price of media.

Further, to the extent that plaintiff solely relies on the alleged deceptive labeling and pricing of the P & W special media to establish price fixing without the aid of other *in*direct non-price restraints, plaintiff's argument must fail. If indeed the "special" media were only generic media "in disguise", the higher price charged for the media would not tend to fix prices of media at a higher level since other (non-Washington Mills) distributors could easily compete with much lower prices by selling

the identical generic media. Plaintiff has not set forth any reasons why the sale of identical generic media by other distributors would be infeasible or impossible.

Under a rule of reason analysis, plaintiff must establish actual anti-competitive effect of the defendants' actions. This entails bearing the burden of demonstrating the relevant product and geographical markets, since it is only with reference to these markets that defendants' power to affect competition can be measured. *Hornsby Oil Co. v. Champion Spark Plug Co.*, 714 F.2d 1384, 1392 (5th Cir. 1983).

The definition of both the product and geographic markets is in dispute. Plaintiff contends that the relevant product market is "Pratt and Whitney media" – meaning all media sold P & W. Plaintiff insists that this is the appropriate market definition since Washington Mills' alleged deceptive labeling of generic media as "special" presupposes a separate product market – that product being all media sold to P & W. A relevant product market is comprised of goods or services with which a defendant's product effectively competes. In re *Municipal Bond Reporting Antitrust Litigation*, 672 F.2d 436, 442-43 (5th Cir. 1982). Inclusion of products in a market is normally determined by reference to any one of three economic tests. First, the court can look to the cross-elasticity of demand between products. *United States v. E.I. DuPont de Nemours & Co.*, 351 U.S. 377, 76 S. Ct. 994 (1956). Second, the court may determine that products have reasonable interchangeability in use. Thus, if a substitute product would affect demand for a given market product, assuming a price change in the market product, the substitutable product would effectively compete in the same

product market with the market product. *Id.* Lastly, a court can examine the supply side substitutability of related products – the ease with which a noncompetitor can adapt to a substitute product's production. *Telex Corp. v. I.B.M. Corp.*, 510 F.2d 894 (10th Cir. 1975), *cert. denied,* 423 U.S. 802, 96 S. Ct. 8 (1976).

While the question of relevant markets is ordinarily one for the jury, the court finds as a matter of law that plaintiff has not carried its burden on summary judgment of defining a relevant product market. The court is not aware of any case upholding a product market definition which is limited to one consumer – here P & W. *See, e.g., Domed Stadium Hotel, Inc. v. Holiday Inns, Inc.*, 732 F.2d 480, 488 (5th Cir. 1984) ("[A]bsent exceptional market conditions, one brand in a market of competing brands cannot constitute a relevant product market.") While such a definition might be plausible under the right facts and given sufficient proof, plaintiff has not set forth evidence necessary to sustain such a market definition. The mere fact that Washington Mills may have engaged in alleged deceptive labeling of its P & W "special" media does not create a product market limited to P & W media. Plaintiff has not offered any economic statistics, analysis or other expert proof which would serve to delineate such a restrictive market. *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 105 S. Ct. 2847 (1985), cited by plaintiff in support of its position, is inapposite. Although *Aspen Skiing Co.* did involve a restricted product (and geographic) market, unlike the instant matter the plaintiff there presented economic evidence which properly supported the trial court's finding that the relevant product

market was limited to "Aspen skiing." Here there is no such evidence.

Plaintiff makes a second argument concerning the relevant product market. Plaintiff contends that P & W media may be a relevant *submarket* of the market of ceramic tumbling media. The Supreme Court has recognized that "[t]here may be submarkets that are separate economic entities." *United States v. Grinnell Corp.*, 384 U.S. 563, 572, 86 S. Ct. 1698, 1703 (1966). "The boundaries of such a submarket may be determined by examining such practical indicia as industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes and specialized vendors." *Brown Shoe Co. v. United States*, 370 U.S. 294, 325, 82 S. Ct. 1502, 1524 (1962). Plaintiff has demonstrated none of the above, as its evidence of the limits of a relevant submarket does not establish any economic reasons for the existence of such a submarket.

Assuming *arguendo* a well-defined product market, plaintiff fails to support its contention that the relevant geographic market is the Southeastern United States – meaning the states of Georgia, South Carolina and Alabama. A relevant geographic market is the area of effective competition. *American Key Corp. v. Cole National Corp.*, 762 F.2d 1569, 1581 (11th Cir. 1985); *Hecht v. Pro-Football, Inc.*, 570 F.2d 982, 988 (D.C. Cir. 1977), *cert. denied*, 436 U.S. 956, 98 S. Ct. 3069 (1979).

Plaintiff argues that Florida and Tennessee should be excluded from the geographic market because they are

natural markets in their own right since they are beyond the distribution capabilities of Atlanta wholesalers. Assuming that this assertion would indicate a relevant geographic market, plaintiff does not indicate in its brief what evidence, if any, supports such a finding. There is no economic analysis or other expert opinion in the record which would sustain this definition of a geographic market.

Since plaintiff has failed to establish the relevant markets involved in defendants' alleged violations, the court cannot assess, for purposes of the instant motion, actual anticompetitive conduct in this case.

Accordingly, defendants' motion for summary judgment is granted as to plaintiff's claims under section 1 of the Sherman Act.

B. *Sherman Act – Section 2*

Plaintiff also alleges that defendant Washington Mills has: (1) attempted to monopolize the ceramic tumbling media market in the Southeastern United States (as defined *supra*); (2) conspired with "others" to monopolize the same markets and (3) monopolized the P & W media submarket.

Section 2 of the Sherman Act provides that: "Every person who shall monopolize, or combine or conspire with any other person or persons, to monopolize any part of trade or commerce . . . shall be deemed guilty of a felony. . . ." 15 U.S.C. § 2. Plaintiff's claim of monopoly of the P & W special submarket must fail for the reasons set forth *supra* in connection with plaintiff's section 1 claim –

inadequate market definition. A claim of monopoly is entirely dependent on relevant market definition since the hallmark of a monopolizer is structural market power. *United States v. Aluminum Company of America*, 148 F.2d 416 (2d Cir. 1945). Without adequate market definitions, the court cannot assess the structural power of the defendant to control pricing. Therefore, the claim of monopoly cannot survive summary judgment.

To sustain a claim of attempted monopoly, a plaintiff must show: (1) the relevant product and geographic markets; (2) that the defendant had the specific intent to gain a monopoly position in the market and (3) that there was a dangerous probability of *de facto* monopolization. *American Tobacco Co. v. United States*, 328 U.S. 781, 66 S. Ct. 1125 (1946); *Bill Beasely Farms, Inc. v. Hubbard Farms*, 695 F.2d 1341, 1343 (11th Cir. 1983); *Photovest Corp. v. Fotomat Corp.*, 606 F.2d 704 (7th Cir. 1979); *cert. denied*, 445 U.S. 917, 100 S. Ct. 1278 (1980). With respect to the attempt claim, plaintiff has failed to establish the relevant market as the court noted *supra*. Additionally, plaintiff does not present evidence of a specific intent to monopolize. For these reasons, plaintiff's claim for attempted monopolization must also fail.

Plaintiff also presents a claim for combination or conspiracy to monopolize the Southeastern United States market. Section 2 conspiracy claims require proof of the same elements involved in an attempt claim with the exception that it is not necessary to show that the scheme to monopolize was ever "attempted to any harmful extent." *American Tobacco Co.*, 328 U.S. at 811, 66 S. Ct. at 1139. Again, failure to adequately define the relevant markets is fatal to plaintiff's claim. The anti-competitive evil thought to be proscribed by the "combination or

conspiracy" language of section 2 lies in the power of the co-conspirators to raise prices when they so desire. *Id.* at 811, 66 S. Ct. at 1140. A finding of such power requires relevant market definitions.

Accordingly, defendants' motion for summary judgment is granted as to plaintiff's claims under section 2 of the Sherman Act.

C. *Clayton Act – Section 3*

Section 3 of the Clayton Act provides:

> It shall be unlawful for any person engaged in commerce . . . to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities . . . for use, consumption or resale . . . on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor . . . where the effect . . . may be to substantially lessen competition or tend to create a monopoly. . . .

15 U.S.C. § 14.

There is no evidence which would implicate this provision of the Clayton Act.

Accordingly, defendants' motion for summary judgment is granted as to plaintiff's claim under section 3 of the Clayton Act.

D. *Price Discrimination – Robinson-Patman Act*

Section 2(a) of the Robinson-Patman Act proscribes price discrimination between different purchasers of

commodities of like grade and quality. 15 U.S.C. § 13(a). Plaintiff alleges that Washington Mills discriminated in price by selling like media to BCS at prices lower than those offered to DeLong. Further, plaintiff contends that Washington Mills' infrequent direct sales to P & W are at lower prices than those charged to DeLong by Washington Mills for media which was then resold to P & W by DeLong. Thus, plaintiff's allegations fall under both "primary line" and "secondary line" classes of price discrimination cases.

A "primary line" case under section 2(a) involves situations where the discrimination occurs between competitors of the seller. Here, Washington Mills is the seller and, in terms of the direct sales of Washington Mills to end-users such as P & W, DeLong is Washington Mills' competitor since it too sells to P & W. In primary line cases, as with all cases under the Act, a plaintiff must show that the price discrimination resulted in either a substantial lessening of competition or a tendency to create a monopoly in a line of commerce. The term "price discrimination" means a difference in price charged to two or more purchasers. *FTC v. Anheuser-Busch, Inc.*, 363 U.S. 536, 80 S. Ct. 1267 (1960). In a primary line case, the plaintiff may demonstrate "substantial lessening of competition" or "tendency to create a monopoly" by either showing a possibility of competitive harm through an in-depth analysis of market conditions or by proof of "predatory intent" on the part of the defendant. *Utah Pie Co. v. Continental Baking Co.*, 386 U.S. 685, 87 S. Ct. 1326 (1967). Plaintiff has not offered any economic proof reflecting

market conditions, thus, it must establish price discrimination by showing predatory intent on the part of Washington Mills and this plaintiff has failed to do so. Evidence of predatory intent must show the defendant's actu~~al intent~~ to forego short-term profits in order to foreclose competition and ultimately seize market control. *See, e.g., Continental Baking Co. v. Old Homestead Bread Co.*, 476 F.2d 97 (10th Cir.), *cert. denied*, 414 U.S. 975, 94 S. Ct. 289 (1973); *Fry Roofing Co. v. FTC*, 371 F.2d 277 (7th Cir. 1966). Evidence of mere intent to capture sales is not enough; the plaintiff must show the defendant's long-term intent to control the market. *International Air Industries, Inc. v. American Excelsior Co.*, 517 F.2d 714, 723 (5th Cir. 1975). Plaintiff's evidence demonstrates no such predatory intent. There is no evidence that Washington Mills priced below cost when selling direct. Nor is there any evidence that Washington Mills sought, or was capable of attaining, market control in the selling or distribution of ceramic media by its infrequent direct sales of media to end-users at prices lower than those offered to its distributors.

The remainder of plaintiff's Robinson-Patman Act claims are secondary line claims. Secondary line cases involve price discrimination between two buyers – here, plaintiff and BCS. Plaintiff claims that BCS was offered the same media at lower price by Washington Mills than were offered plaintiff. Plaintiff identifies four methods used by Washington Mills to effect such discrimination. First, plaintiff alleges that some media, marked as "generic," were sold to BCS at lower unit prices and with more favorable (ninety day) payment terms. Second, plaintiff contends that media corresponding to "special"

media for P & W was sold to BCS at list price, while plaintiff was charged the "special" price. Third, plaintiff avers that Washington Mills allowed BCS a larger discount than the twenty-five percent (25%) discount allowed to DeLong. Fourth, plaintiff alleges that the commission payments to BCS through W & T constituted price rebates to BCS which plaintiff did not receive.

In contrast with primary line cases, secondary line cases do not require the plaintiff to prove substantial lessening of competition and/or tendency to create a monopoly by direct or inferential economic evidence. Instead, plaintiff can establish a prima facie case of price discrimination by evidence of a substantial price discrimination between competing purchasers which is sustained over time. *Falls City Industries, Inc. v. Vanco Beverage, Inc.*, 460 U.S. 428, 103 S. Ct. 1282 (1983); *FTC v. Morton Salt*, 334 U.S. 37, 68 S. Ct. 822 (1948).

Defendants state that Washington Mills never charged plaintiff a different *price* for media than that charged to other distributors. However, defendants' argument ignores the fact that *price terms*, apart form the price charged, can impact on price and create price differentials—The ninety-day preferential payment period, the alleged greater discount, the alleged identity between "special" and generic media and the "commissions"/rebates paid to W & T could constitute price differentials. *See Rose Confections, Inc. v. Ambrosia Chocolate Co.*, 816 F.2d 381, 387-88 (8th Cir. 1987). Therefore, the court finds that plaintiff has established sufficient facts of secondary line price discrimination for the purposes of withstanding summary judgment on this issue.

This finding does not, however, end the court's inquiry. Defendants urge several affirmative defenses which can rebut plaintiff's prima facie showing. The first of these defenses is specifically recognized in section 2(a) of the Act:

> Nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: . . . .

15 U.S.C. § 13(a).

Defendant Washington Mills justifies the differential in the "special" and generic media by claiming that heightened quality control and precise adherence to P & W specifications for media increase the cost, and therefore the price, of the "special" media. (Dep. J. Williams 13-16); (Dep. van der Sande 71-73). However, Washington Mills has not established in what respects quality control was enhanced or what the P & W specifications were. Thus, defendants have failed to establish section 2(a) defense based upon "quality control cost."

In a related argument, defendants state that the price differential between the "special" and generic media reflects consumer preference (that of P & W) and is thus justified under the Act. In support of this position, defendants cite *Borden Co. v. FTC*, 381 F.2d 175 (5th Cir. 1967). *Borden* involved sales by a milk producer of two lines of milk – a generic non-premium brand and a labeled "Borden" premium brand. The milk in the two types of cans was identical. In holding that the higher price of the labeled milk was justified by consumer preference, the

former Fifth Circuit focused on the industry good-will generated by the "Borden" label. The good-will was the result of extended advertising and promotional efforts by the defendant and the higher price reflected those added costs. *Id.* at 180. Defendants have presented no evidence which demonstrates such commercial good-will *as a legitimate cost* consideration on this issue. Therefore, defendants' consumer preference defense has not been established.

Defendants' third affirmative defense under the Robinson-Patman Act involves the judicially created doctrine of availability. In an availability defense, defendant must show that although the seller offered two prices for the same commodity to two buyers the reduced price was available to all buyers. Thus, "[w]here a purchaser does not take advantage of a lower price or discount which is functionally available on an equal basis, it has been held that no price discrimination has occurred." *Shreve Equipment, Inc. v. Clay Equipment Co.*, 650 F.2d 101, 105 (6th Cir. 1981). The claimed W & T rebates, more favorable payment terms and the higher discount available to BCS were not available to DeLong. Plaintiff also contends that the price differential between the allegedly identical "special" media and generic media cannot be overcome by an availability defense since P & W will not allow media other than "P & W" Special" into the plant. Plaintiff claims that this fact forecloses the availability of the lesser priced generic media since there is no possibility of resale to P & W. The fact that P & W would not accept anything but "special" media does not affect the availability of the generic media to plaintiff from Washington Mills. However, even though defendants can establish an

availability defense based on the alleged identity between the "special" and generic media, such a defense does not support summary judgment against plaintiff's claim of price discrimination based on the alleged W & T rebates, favorable BCS payment terms and higher BCS discounts.

Accordingly, defendants' motion for summary judgment is granted as to plaintiff's Robinson-Patman Act claims insofar as those claims are based on Washington Mills' direct sales of media to end-users or Washington Mills' non-direct sales of media where the claimed price discrimination results from alleged differences in price between "special" and generic media sold to P & W. Defendants' motion for summary judgment is denied as to plaintiff's Robinson-Patman Act claims insofar as the claims are based on alleged rebates, favorable payment terms and higher discounts grants BCS by Washington Mills.

E. *Pendent State Law Claims*

1. *Breach of Contract*

Under Georgia law, distributorship agreements which are not in writing are terminable at will for any cause. *West Virginia Glass Specialty Co., Inc. v. Guice & Walshe, Inc.*, 170 Ga. App. 556, 557-58, 317 S.E.2d 592, 594 (1984). There is no single written instrument which can stand as a distributorship agreement in this case. Nevertheless, plaintiff argues that invoices, letters and various memoranda from Washington Mills' home office constitute a written distributorship agreement.

Although a single writing may consist of several separate memoranda, the memoranda must be exchanged or executed contemporaneously. *Whitley v. Patrick*, 226 Ga. 87, 88, 172 S.E.2d 692, 693 (1970); *Cassville-White Assoc., Ltd. v. Bartow Assoc., Inc.*, 150 Ga. App. 561, 258 S.E.2d 175 (1979). The various written forms and instruments which plaintiff claims supports the finding of a written distributorship contract were not exchanged or executed contemporaneously and, therefore, do not constitute a written distributorship agreement. Thus, the distributorship agreement was oral and terminable at will for any cause.

Accordingly, defendants' motion for summary judgment is granted as to plaintiff's claim for breach contract.

2. *Tortious Interference with Business Relations*

Plaintiff next alleges that Washington Mills has tortiously interfered with DeLong's business relations with its media end-user customers. Plaintiff states, and Washington Mills admits, that after DeLong's termination as a Washington Mills distributor Washington Mills provided competitor distributors DeLong customer lists and encouraged the distributors to solicit those end-users' business. Since DeLong no longer carried Washington Mills media, this meant in effect that the distributors would be soliciting business in competition with DeLong. DeLong characterizes this activity as soliciting business away from DeLong, since the end-users targeted by Washington Mills were DeLong customers. However, as defendants point out, the end-users can just as easily be characterized as Washington Mills' customers by virtue of

the fact that the end-users were using Washington Mills media – albeit distributed by plaintiff. Further, plaintiff alleges that the very act of terminating the distributorship tortiously interfered with DeLong's business relations in that it could no longer provide its end-user customers with Washington Mills media.

It is undisputed that Washington Mills' contacts with end-users who were once both DeLong and Washington Mills customers occurred only after DeLong was terminated. It is also clear that the distributors who contacted the end-users did not disparage DeLong's business but merely stated that DeLong was no longer a Washington Mills distributor. Further, there is no supported allegation that plaintiff's customer lists were confidential or contained trade secrets.

It is not a tort to solicit the trade of another's customers. *Parks v. Atlanta News Agency*, 115 Ga. App. 842, 845, 156 S.E.2d 137, 142 (1967). Washington Mills has a right to solicit the end-users, as does plaintiff, whether by direct sale or through distributors.

The court also finds unpersuasive plaintiff's argument that the very fact of termination of the distributorship agreement supports a claim for tortious interference. As the court found *supra*, Washington Mills had a right to terminate plaintiff's distributorship without cause and at will. Any impact which the rightful termination had on plaintiff's business relations with its Washington Mills end-user customers is a natural consequence of the exercise of that rightful act. As such, there is no interference on Washington Mills' part tortious or otherwise. *West*

Virginia Glass Specialty Co., Inc., 170 Ga. App. at 557, 317 S.E.2d at 594.

Accordingly, defendants' motion for summary judgment is granted with respect to plaintiff's claim of tortious interference with business relations.

3. *Fraud.*

In Georgia, there are five elements to a claim for fraud: (1) a false representation of a past or present fact; (2) scienter; (3) intention to induce the plaintiff to do some act or to refrain from doing some act; (4) justifiable reliance by the plaintiff upon the falsehood; and (5) damage to the plaintiff caused by the false representation. O.C.G.A. § 51-6-1; *see also Parsells v. Orkin Exterminating Co., Inc.*, 172 Ga. App. 74, 322 S.E.2d 91 (1984).

Plaintiff enumerates six alleged instances of fraud. First, plaintiff claims that Washington Mills' deceptive labeling of "special" media amounted to fraud. Assuming that the labeling was indeed false, plaintiff's own proof reveals a lack of justifiable reliance. At all times, plaintiff disputed the labeling of the media and questioned Washington Mills about the propriety of the labeling practices. (Dep. DeLong. 59); (Aff. DeLong Paras. 14-16). Where plaintiff is aware of the allegedly falsity of a representation there is no justifiable reliance. *See Blanchard v. West*, 115 Ga. App. 814, 815, 156 S.E.2d 164, 166 (1967).

Second, plaintiff alleges that Washington Mills represented that it would charge DeLong the list price for media, less a twenty-five percent (25%) discount. Plaintiff alleges that defendant did not adhere to this promise. It is

unclear from the record whether such a promise was ever made and, if made, how it was breached. To the extent that plaintiff again alludes to the pricing of the "special" media, such a claim for fraud is baseless, as discussed *supra*. To the extent that plaintiff alleges that Washington Mills made a blanket promise to always charge list price less a 25% discount there is no fraud since there is no misrepresentation of a past or present fact – only of a future occurrence. *Lanham v. Mr. B's Oil Co.*, 166 Ga. App. 372, 304 S.E.2d 738, 739 (1983).

Plaintiff's third and fourth allegations of fraud involve representations allegedly made that Washington Mills would charge all distributors on the same basis and with equal payment terms. Again, such promises, if made, would pertain to future events and are not cognizable as fraud.

Plaintiff next alleges that Washington Mills promised that DeLong's sales to end-user customers would be honored and not "held". Apparently, Washington Mills did hold sales to customers when plaintiff was allegedly in arrears on distributor payments. As above, such promises, if made, would be representations concerning future occurrences when made. Therefore, such allegations do not support the claim of fraud.

Sixth, and last, plaintiff alleges that Washington Mills stated that it would maintain DeLong's customer list in confidence. Plaintiff does not aver when Washington Mills made such a representation. If made prior to the dissemination of the list to the other distributors, such as promise concerns, again, only a future event. If the representation occurred post-termination and Washington

Mills had already given the lists to distributors, then such a falsity could arguably support a count of fraud. However, plaintiff's proof supporting this allegation is so scant that it is insufficient to support a determination that such a representation was in fact made.

Accordingly, defendants' motion for summary judgment is granted as to plaintiff's claims of fraud.

III. *SUMMARY*

In sum, the court rules as follows:

(1) defendants' motion for summary judgment is granted as to the following claims by plaintiff:

(a) section 1 of the Sherman Act

(b) section 2 of the Sherman Act

(c) section 3 of the Clayton Act

(d) breach of contract

(e) tortious interference with business relationships

(f) fraud

(2) defendants' motion for summary judgment is granted in part and denied in party as to the following claims by plaintiff:

(a) granted as to plaintiff's claims under section 2(a) of the Robinson-Patman Act insofar as those claims are based on defendant Washington Mills' direct sales of media to end-users or defendant Washington Mills' non-direct sales of media where the

claimed price discrimination results from alleged differences in price between "special" and generic media sold to Pratt and Whitney.

(b) denied as to plaintiff's claims under section 2(a) of the Robinson-Patman Act insofar as those claims based on alleged rebates, favorable payment terms and/or higher distributor discounts granted B.C.S. Company by defendant Washington Mills.

SO ORDERED, this 16 day of June, 1988.

ENTERED ON DOCKET
JUN 17 1988
BY J H
L.D.T., CLERK
DEPUTY CLERK

/s/ G. Ernest Tidwell
G. ERNEST TIDWELL
JUDGE, UNITED STATES
DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

DE LONG EQUIPMENT COMPANY	)	
	)	
V. —	)	CASE NO. 1:86-cv-275-GET
WASHINGTON MILLS ABRASIVE CO.; WASHINGTON MILLS CERAMIC CORPORATION; B.C.S. COMPANY, HANS VAN DER SANDE; JOHN T. WILLIAMS; PETER WILLIAMS; ROBERT E. BALDAUF; and ROBERT F. BIEBEL	)	(Filed July 29, 1988)

ORDER

The above-styled matter is before the court on plaintiff's motion for reconsideration or, in the alternative, for certification of final judgment. Fed. R. Civ. P. 54(b) & 60(b); L.R. 220-6, N.D. Ga. Defendants Washington Mills Abrasive Company, Washington Mills Ceramic Corporation, van der Sande, John T. Williams and Peter Williams move for an order pursuant to 28 U.S.C. § 1292(b) to certify remaining issues for interlocutory appeal. The court addresses the motion *seriatim*.

MOTION FOR RECONSIDERATION

Plaintiff moves the court to reconsider those portions of its Order of June 17, 1988 which granted defendants' motion for summary judgment on plaintiff's claims under section 1 of the Sherman Act and for tortious interference with a business relationship.

A. *Section 1 of the Sherman Act*

The court granted defendants' motion for summary judgment on plaintiff's claim under section 1 of the Sherman Act because plaintiff did not define the relevant geographic or product markets. Such definitions are essential elements of any cause under section 1 which proceeds under a rule of reason analysis. *See Hornsby Oil Co. v. Champion Spark Plug Co.*, 714 F.2d 1384, 1392 (5th Cir. 1983).

Plaintiff, at least tacitly, concedes that it did not prove relevant market definition for the purposes of summary judgment. Nevertheless, plaintiff urges the court to reconsider its ruling because, contrary to the court's finding, the alleged restraint is horizontal and not vertical.

Plaintiff is correct in noting that horizontal restraints on price, whether direct or indirect, are *per se* illegal. If the instant restraint were properly characterized as a horizontal restraint, therefore, there would be no need for plaintiff to present evidence on market definitions. However, plaintiff incorrectly views the alleged Washington Mills-B.C.S. conspiracy as horizontal. Washington Mills manufactures the product distributed by B.C.S. (and by plaintiff); therefore, Washington Mills and plaintiff exist at different levels of production. Washington Mills extremely infrequent direct sales of media to end-user consumers cannot serve to alter this clear fact.

The very essence of a vertical restraint is that it involves actors on different levels of production. *See* 7 P. Areeda & D. Turner, Antitrust Law Para. 1437, at 3-4 (1986). Plaintiff's argument that this obviously vertical activity can somehow be construed as horizontal because

its *effects* may be horizontal has been expressly rejected by the Supreme Court. *Business Electronics Corp. v. Sharp Electronics Corp.*, 108 S.Ct. 1515, 1523 & n.4 (1988).

Accordingly, the court denies plaintiff's motion for reconsideration as to the court's ruling on plaintiff's claim under section 1 of the Sherman Act.

B. *Tortious Interference with Business Relations*

Plaintiff also moves the court to reconsider that portion of its Order which granted defendants' motion for summary judgment on plaintiff's claim for tortious interference with business relations. Plaintiff claimed that Washington Mills' admitted use of a customer list "belonging to" De Long constituted a tort.

In support of this contention, plaintiff directs the court's attention to *Robert E. Vance & Assoc., Inc. v. Baronet Corp.*, 487 F. Supp. 790 (N.D. Ga. 1979). In that case, Judge Evans held that the use of a secret or confidential customer list by the defendant could support a claim for tortious interference. *Id.* at 799. *Vance* is distinguishable from the case at bar in at least two important respects.

First, the list in question in *Vance* was compiled by the plaintiff for the express purpose of marketing its product through the defendant. The court therein found that the great time and expense incurred by the plaintiff in so developing the list might lead a jury to believe that the list was intended to be confidential. In the instant matter, plaintiff put forward no evidence concerning preparation of the list which would lead this court to engage in the speculation that it was intended to be either

a trade secret or confidential. Second, and more importantly, there is no other evidence in the record, apart from assertions by counsel in their briefs, that the list was intended by plaintiff to be confidential. Asserting, as plaintiff does in its Brief in Support of the Motion for Reconsideration, that the list is a "valuable business asset" is not enough to establish confidentiality.

Accordingly, plaintiff's motion for reconsideration is denied as to the court's ruling on plaintiff's claim for tortious interference with business relations.

MOTIONS FOR CERTIFICATION

Plaintiff moves for certification of final judgment pursuant to Fed. R. Civ. P. 54(b). Defendants do not contest the motion; however, defendants move for an order under 28 U.S.C. § 1292(b) to certify for interlocutory appeal the court's denial of their motion for summary judgment on plaintiff's claims under the Robinson-Patman Act.

The court finds that "there is no just reason for delay" and directs the Clerk to enter final judgment for defendants on all plaintiff's claims with the exception of plaintiff's claims under the Robinson-Patman Act which survived defendants' motion for summary judgment.

Defendants' motion to certify the denial of their motion for summary judgment on certain claims under the Robinson-Patman Act for interlocutory appeal is granted. The facts underlying the price discrimination claims are intertwined with those involved in the antitrust claims and the issue sought to be appealed involves

"a controlling question of law as to which there is substantial ground for difference of opinion." 28 U.S.C. § 1292(b). The reasons for the denial of summary judgment are fully set forth in the court's Order of June 17th, as is required in this circuit. *See Consultants and Designers, Inc. v. Butler Service Group, Inc.*, 720 F.2d 1553, 1564 (11th Cir. 1983).

SUMMARY

In sum, the court rules as follows:

(1) Plaintiff's motion for reconsideration is denied;

(2) Plaintiff's motion for certification of final judgment under Rule 54(b) is granted; and

(3) Defendants' motion for certification of interlocutory appeal under 28 U.S.C. § 1292(b) is granted.

SO ORDERED, this 28 day of July, 1988.

ENTERED ON DOCKET
AUG 2 1988
L.D.T. CLERK
BY Judith G. Huffard
DEPUTY CLERK

/s/ G. Ernest Tidwell
G. ERNEST TIDWELL
JUDGE, UNITED STATES
DISTRICT COURT

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 88-8664

DELONG EQUIPMENT COMPANY,

Plaintiff-Appellant,

versus

WASHINGTON MILLS ABRASIVE COMPANY, et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Georgia
(Filed Jan. 22, 1990)

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING IN BANC

(Opinion November 13, 1989, 11 Cir., 198 ___, ___F.2d___).

(January 22, 1990)

Before VANCE and ANDERSON, Circuit Judges, and ATKINS*, Senior District Judge.

PER CURIAM:

(X) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing in banc (Rule 35, Federal Rules of

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*Honorable C. Clyde Atkins, Senior U.S. District Judge for the Southern District of Florida, sitting by designation.

Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing In Banc are DENIED.

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing In Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause in banc, and a majority of the judges in active service not having voted in favor of it, Rehearing In Banc is DENIED.

ENTERED FOR THE COURT:

/s/ R. Lanier Anderson, III
United States Circuit Judge